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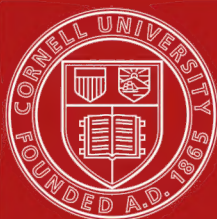
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THE LAW  
OF  
NEGOTIABLE INSTRUMENTS

STATUTES, CASES AND AUTHORITIES

EDITED BY  
ERNEST W. HUFFCUT  
PROFESSOR OF LAW IN CORNELL UNIVERSITY COLLEGE OF LAW

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SECOND EDITION REVISED AND ENLARGED

BY  
FREDERICK D. COLSON  
OF THE NEW YORK BAR  
*(Formerly of the Faculty of the Cornell University College of Law)*

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NEW YORK  
BAKER, VOORHIS & COMPANY

1910

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## PREFACE TO FIRST EDITION.

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THE enactment of the Negotiable Instruments Law in several American States and its probable enactment in others, renders necessary a familiarity with that Code on the part of all law students. Founded as it is upon the Digest of Judge Chalmers, afterward enacted into the English Bills of Exchange Act, it presents the best statement available of the results of English and American judicial decisions. Even before its adoption by the legislatures in Great Britain and the United States, Judge Chalmers' Digest had been edited for use in law schools, and had met with much favor for purposes of study and instruction.

A Digest or Code is, however, but a set of abstract rules. The student needs to see the rules in operation upon concrete facts in order to appreciate their force and effect. It is the purpose of this book to set over against each important rule a case or a selection of cases from which the rule might be deduced did no Code exist and in which the rule, as embodied in the Code, may be studied in its application to concrete facts. In this way it is hoped to give vitality and interest to what are otherwise mere abstract propositions of law. As to the relation of the cases to the Code, the reader is referred to Judge Chalmers' remarks, found on page 119 [5] of this work, and to the opinion of Lord Herschell on page 127 [126], and of Lord Russell of Killowen on page 442 [396].

Under the sections of the statute will be found references to the "Cases and Authorities" which make up Part II [I] of this work. Conversely there is set opposite the title to each case the section number of the statute which is applicable to it. Under this arrangement the student has constantly before him the enactment of the legislatures and the decisions of the courts.

In Article I, dealing mainly with matters of historical interest, the editor has made free use of the Introduction to Chalmers' Digest and of the first two chapters of Mr. Scrutton's Elements of Mercantile Law. Elsewhere in the book, two or three chapters of Byles' Treatise on Bills of Exchange have been reprinted, where a selection of cases would have occupied space out of proportion

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to the importance of the subject. The topics of "Guaranty," "Non-negotiable Notes," and some others of minor interest, have been added to those included within the Negotiable Instruments Law.

In the preparation of the book the editor has derived the greatest assistance from the well-known works of Sir John Byles, Mr. Daniel, and Professor Ames, and from the article on Bills of Exchange in the second edition of the American and English Encyclopedia of Law.

The book is intended primarily for students. It constitutes, however, a somewhat complete annotation of the Negotiable Instruments Law, and as such may prove of value to practitioners. On many points, editorial notes have been added, in order to give greater completeness to the subject treated, and to indicate any conflict of authority that may have preceded the enactment of the statute.

E. W. H.

CORNELL UNIVERSITY,  
*February, 1898.*

## PREFACE TO THE SECOND EDITION.

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At the date of the preface to the first edition of this work only four states had passed the Negotiable Instruments Law and there had been no cases decided under it. Since that time this act has been adopted in thirty-eight states and territories. The main purpose of this edition is to bring the first edition down to date by incorporating into it such cases decided under this enactment as seem desirable in order to present the case law on negotiable instruments as it exists to-day. The effort, of course, has been to select those cases where it is held that the Negotiable Instruments Act has changed the pre-existing law or at least has resolved a conflict existing among the earlier authorities. So far, however, as the cases in the first edition, no matter how old, are satisfactory illustrations of the provisions of the statute, they have not, in general, been displaced simply in order to get more recent cases or even cases citing the Negotiable Instruments Law. A few cases not decided under the statute have been added where the treatment in the first edition of the subjects involved seemed inadequate.

Practically all of Mr. Huffcut's notes have been retained. These are followed by the letter "H," while the notes added by the present editor are followed by the letter "C."

Permission was very kindly given by Mr. McKeehan and the American Law Register to reprint the extracts from the article on "The Ames-Brewster Controversy," and by Professor Williston and the Harvard Law Review Association to reprint the article entitled "An Ambiguity in the Negotiable Instruments Law." It is regretted that the limitations of space forbade the reprinting of more of Mr. McKeehan's article, for it remains to-day, in the opinion of the editor, the best exposition and general survey of most of the troublesome parts of the Negotiable Instruments Law. The list of states and territories which have enacted this statute was compiled largely, with the kind permission of the draftsman of the act (J. J. Crawford, Esq.), from the list given in the third edition of his work on the Negotiable Instruments Law.

ALBANY, NEW YORK,  
*September, 1910.*

F. D. C.





# TABLE OF CONTENTS.

## PART I.

### Cases and Authorities.

## ARTICLE I.

### GENERAL PROVISIONS.

	PAGE.
I. CODES GOVERNING BILLS, NOTES AND CHECKS.....	3
1. The English Bills of Exchange Act.....	3
2. The American Negotiable Instruments Law.....	9
3. Continental Codes .....	13
II. CONSTRUCTION OF CODIFYING STATUTES.....	15
III. THE LAW MERCHANT.....	15
1. The Law Merchant and its history.....	15
2. History of negotiable instruments.....	24
(a) Bills, notes and checks.....	24
(b) Other negotiable paper.....	31

## ARTICLE II.

### FORM AND INTERPRETATION.

#### (i) *Form Required.*

I. WRITING AND SIGNATURE .....	34
II. UNCONDITIONAL PROMISE OR ORDER TO PAY A SUM CERTAIN IN MONEY,	37
1. A note must contain a promise.....	37
2. A bill must contain an order.....	44
3. The promise or order must be unconditional.....	46
(a) Conditional promises or orders not negotiable.....	46
(b) An order or promise to pay out of a particular fund is conditional.....	49
(c) An indication of a particular fund does not render promise conditional .....	50
(d) Nor a statement of transaction which gives rise to instrument .....	55
4. The sum to be paid must be certain.....	61
(a) What amounts to certainty generally.....	61
(b) Engagement to pay interest: contingency.....	64
(c) Engagement to pay by instalments: contingency.....	67
(d) Engagement that on default whole shall be due.....	72
(e) Engagement to pay exchange.....	74
(f) Engagement to pay costs of collection or attorney's fees,	78
5. Must be payable in money.....	81
(a) Payment must be in money.....	81
(b) What constitutes current money.....	82

6. Must not order or promise any act in addition to payment of money	90
(a) Effect of additional stipulations	90
(b) Exceptions: (1) Authorizing sale of collateral	91
(2) Authorizing confession of judgment	93
(3) Waiving exemptions	94
(4) Election to require something in lieu of money	94
III. PAYABLE ON DEMAND OR AT A DETERMINABLE FUTURE TIME	96
1. When payable on demand	96
(a) Payable at sight	96
(b) No time for payment expressed	96
(c) Issued, accepted or indorsed when overdue	97
2. When payable at a fixed or determinable future time	97
(a) A fixed time after date or sight	97
(b) On or before a fixed determinate time specified	97
(c) On or at a fixed period after the occurrence of a specified event	102
3. When payable on a contingency	103
IV. PAYABLE TO ORDER OR BEARER	106
1. Payable to order of a specified person	107
(a) Payee must be certain	107
(b) Payee may be (1) One not maker, drawer or drawee	113
(2) Drawer or maker	113
(3) Drawee	114
(4) Two or more payees jointly	115
(5) One or more of several payees	118
(6) The holder of an office for the time being	121
2. Payable to bearer	122
(a) Payable to person named or bearer	122
(b) Payable to order of fictitious person	123
(c) Payable to name not purporting to be name of any person	144
(d) When only or last indorsement in blank	144
V. DRAWEE MUST BE CERTAIN	148
VI. DELIVERY ESSENTIAL	151
VII. NON-ESSENTIALS	158

(ii) *Interpretation.*

VIII. DATE	161
IX. BLANKS, AUTHORITY TO FILL	163
X. AMBIGUOUS LANGUAGE	192
1. Discrepancy between words and figures	192
2. Interest, how computed	194
3. Instrument not dated	195
4. Conflict between written and printed provisions	195
5. Doubt whether bill or note	196
6. Irregular signatures	196
7. Joint and several liability	196
XI. AMBIGUOUS SIGNATURES	197
XII. INDORSEMENT BY INFANT OR CORPORATION	220
XIII. FORGED SIGNATURES	221

## ARTICLE III.

## CONSIDERATION OF NEGOTIABLE INSTRUMENTS.

	PAGE.
I. PRESUMPTION OF CONSIDERATION .....	234
II. WHAT CONSTITUTES CONSIDERATION .....	239
III. HOLDER FOR VALUE .....	249
IV. EFFECT OF WANT OF CONSIDERATION .....	253
V. LIABILITY OF ACCOMMODATION PARTY .....	254

## ARTICLE IV.

## NEGOTIATION.

I. WHAT CONSTITUTES NEGOTIATION OR TRANSFER .....	259
1. Transfer by delivery .....	260
2. Transfer by indorsement and delivery .....	261
(a) Transfer by indorsing assignment .....	261
(b) Transfer by indorsing guaranty .....	263
II. INDORSEMENT: FORM REQUIRED .....	266
1. Must be written on instrument or allonge .....	266
2. Must be of entire instrument .....	267
III. INDORSEMENT: KINDS OF .....	268
1. Special indorsement .....	268
2. Blank indorsement .....	268
3. Restrictive indorsement .....	271
4. Qualified indorsement .....	284
5. Conditional indorsement .....	287
IV. INDORSEMENT: METHODS AND EFFECT .....	288
1. Indorsement of instrument payable to bearer .....	288
2. Indorsement where payable to two or more persons .....	298
3. Indorsement where payable to cashier, etc. ....	299
4. Indorsement where name misspelled, etc. ....	301
5. Presumption as to time of indorsement .....	302
6. Presumption as to place of indorsement .....	302
7. Continuation of negotiable character .....	306
8. Striking out indorsement .....	306
V. TRANSFER WITHOUT INDORSEMENT .....	307
VI. RE-TRANSFER TO PRIOR PARTY .....	310

## ARTICLE V.

## RIGHTS OF HOLDER.

I. TO SUE AND RECEIVE PAYMENT .....	314
II. HOLDER IN DUE COURSE .....	319
1. Requisites to constitute holder in due course .....	319
(a) Instrument must be complete and regular .....	319
(b) Instrument must not be overdue .....	320
(c) Must be taken in good faith and for value .....	337
(d) Must be taken without notice of infirmity or defect .....	340
(e) Notice before full amount paid .....	357
2. Holder deriving title from holder in due course .....	360
3. Right of holder in due course to recover full amount .....	361
4. Burden of proof .....	365
III. DEFENCES TO NEGOTIABLE INSTRUMENTS .....	370

ARTICLE VI.

LIABILITY OF PARTIES.

	PAGE.
I. MAKER: ABSOLUTE, PRIMARY LIABILITY; ADMISSIONS.....	400
1. Presentment for payment unnecessary.....	400
2. Liability on lost or destroyed instrument.....	400
3. Admission of existence and capacity of payee.....	401
II. ACCEPTOR: ABSOLUTE, PRIMARY LIABILITY; ADMISSIONS.....	403
1. Presentment for payment unnecessary.....	403
2. Admissions as to drawer and payee.....	403
III. DRAWER; SECONDARY, CONDITIONAL LIABILITY.....	418
1. Conditions: presentment, notice, protest.....	418
2. Admissions as to payee.....	418
IV. SELLER: WARRANTIES.....	419
1. Instrument genuine and what it purports to be.....	419
2. Title of seller.....	433
3. Capacity of prior parties.....	434
4. Knowledge of invalidity or valuelessness.....	435
5. Indorser: instrument valid and subsisting.....	437
6. Liability of agent as seller.....	441
V. INDORSER: SECONDARY, CONDITIONAL LIABILITY.....	442
1. Indorser's contract as seller.....	442
2. Indorser's contract as assurer of payment.....	442
3. Irregular indorser.....	446
4. Order of indorsers' liability.....	459
VI. ACCEPTOR FOR HONOR.....	466
VII. GUARANTOR.....	466
1. (a) Does guaranty-indorsement by holder transfer title?... (b) May a guaranty be written above a blank indorsement?.....	466
2. Is a transferee a holder in due course?.....	467
3. What is the contract of the guarantor?.....	467
4. Is the guaranty transferable?..... (a) Is it negotiable?..... (b) Is it assignable?.....	471
5. Defences available to guarantor.....	474

ARTICLE VII.

DUTIES OF HOLDER: PRESENTMENT FOR PAYMENT.

I. NECESSITY OF PRESENTMENT.....	477
1. Not to charge acceptor or maker.....	477
2. Presentment necessary to charge drawer or indorser.....	480
II. WHAT CONSTITUTES SUFFICIENT PRESENTMENT.....	480
1. By holder or authorized representative.....	480
2. At the proper time.....	483
3. At the proper place.....	508
4. To the proper person.....	516
5. By exhibiting the instrument.....	518
III. WHEN DELAY IN PRESENTMENT EXCUSED.....	518
IV. WHEN PRESENTMENT DISPENSED WITH.....	520
1. When no right to require or expect it.....	520
2. Accommodation indorsers.....	523

# TABLE OF CONTENTS.

xi

	PAGE.
3. When impossible .....	524
4. Waiver .....	527
V. PAYMENT IN DUE COURSE.....	529

## ARTICLE VIII.

### DUTIES OF HOLDER: NOTICE OF DISHONOR.

I. NOTICE NECESSARY TO CHARGE DRAWER OR INDORSER.....	530
II. WHAT CONSTITUTES SUFFICIENT NOTICE.....	533
1. By whom notice must be given.....	533
2. Form of notice.....	539
3. Mode of notice.....	542
(a) Personal delivery .....	542
(b) Mail delivery .....	543
4. To whom notice may be given.....	546
5. Time within which notice must be given.....	548
(a) Where parties reside in the same place.....	548
(b) Where parties reside in different places.....	554
(c) Successive notices .....	561
6. Place at which notice must be given .....	565
III. WHEN DELAY IN GIVING NOTICE EXCUSED.....	573
IV. WHEN NOTICE MAY BE DISPENSED WITH.....	575
1. When notice need not be given to drawer.....	575
2. When notice need not be given to indorser.....	577
3. When notice to drawer or indorser dispensed with.....	580
(a) Due diligence .....	580
(b) Waiver .....	580
(c) Notice of non-payment where acceptance refused.....	586
(d) Effect of omission to give notice of non-acceptance....	587
V. DUTIES OF HOLDER: PROTEST.....	589

## ARTICLE IX.

### DISCHARGE OF NEGOTIABLE INSTRUMENTS.

I. DISCHARGE OF THE INSTRUMENT.....	591
1. Payment and re-transfer.....	591
2. Cancellation or renunciation .....	599
3. Alteration .....	608
II. DISCHARGE OF PARTY SECONDARILY LIABLE.....	626
III. PAYMENT BY PARTY SECONDARILY LIABLE.....	639
IV. PAYMENT FOR HONOR.....	641

## ARTICLE X.

### BILLS OF EXCHANGE: FORM AND INTERPRETATION.

I. FORM .....	642
1. Formal requisites generally .....	642
2. The drawee or drawees.....	642
(a) Must be certain.....	642
(b) May be joint, but not alternative or successive.....	642
3. Referee in case of need.....	643
II. INTERPRETATION .....	644

	PAGE.
1. Bill not an assignment of funds.....	644
2. Inland and foreign bills.....	646
3. Bill treated as promissory note.....	647

## ARTICLE XI.

### ACCEPTANCE OF BILLS OF EXCHANGE.

I. FORM AND EFFECT.....	648
1. Acceptance must be in writing and signed by drawee.....	648
(a) Writing and signature.....	648
(b) Only the drawee can accept.....	649
(c) Delivery necessary.....	650
2. Acceptance by separate instrument.....	651
3. Promise to accept must be in writing.....	654
4. Acceptance by refusal to return the bill.....	658
5. Acceptance of incomplete or dishonored bill.....	666
II. KINDS OF ACCEPTANCES.....	668
1. General acceptance.....	668
2. Qualified acceptance.....	673
(a) Conditional acceptance.....	673
(b) Partial acceptance.....	675
(c) Local acceptance.....	675
(d) Acceptance qualified as to time.....	676
(e) Acceptance by one or more drawees, but not by all.....	676
3. Effect of qualified acceptance.....	677
(a) Holder may refuse qualified acceptance.....	677
(b) Qualified acceptance discharges non-assenting antecedent parties.....	677

## ARTICLE XII.

### PRESENTMENT OF BILLS OF EXCHANGE FOR ACCEPTANCE.

I. IN WHAT CASES PRESENTMENT FOR ACCEPTANCE NECESSARY.....	679
II. WHAT CONSTITUTES SUFFICIENT PRESENTMENT.....	685
III. WHEN PRESENTMENT FOR ACCEPTANCE EXCUSED.....	688
IV. DUTY OF HOLDER WHERE BILL NOT ACCEPTED.....	689
V. EFFECT OF DISHONOR OF BILL PRESENTED FOR ACCEPTANCE.....	689

## ARTICLE XIII.

### PROTEST OF BILLS OF EXCHANGE.

I. WHAT INSTRUMENTS MUST BE PROTESTED.....	691
II. WHAT CONSTITUTES SUFFICIENT PROTEST.....	691
III. BY WHOM PROTEST SHOULD BE MADE.....	698

## ARTICLE XIV.

ACCEPTANCE FOR HONOR.....	701
---------------------------	-----

## ARTICLE XV.

PAYMENT FOR HONOR.....	707
------------------------	-----

## ARTICLE XVI.

	PAGE.
BILLS IN A SET.....	709

## ARTICLE XVII.

## PROMISSORY NOTES AND CHECKS.

I. PROMISSORY NOTES .....	714
1. Origin and history.....	714
2. Form and interpretation.....	714
3. Non-negotiable notes .....	715
II. CHECKS .....	722
1. Check distinguished from bill of exchange.....	722
2. Presentment of check.....	725
(a) Effect of delay upon drawer's liability.....	725
(b) Effect of delay upon indorser's liability.....	734
3. Certification of check.....	743
(a) Effect upon drawer's liability.....	743
(b) Effect upon indorser's liability.....	748
4. A check not an assignment of funds.....	752
5. Forged or raised checks: reciprocal obligations of bank and depositor .....	758
6. Liability of drawee to drawer for wrongful dishonor.....	772

---

 PART II.

LIST OF THE STATES AND TERRITORIES WHICH HAVE ENACTED THE NEGOTIA- BLE INSTRUMENTS LAW.....	776
THE NEW YORK NEGOTIABLE INSTRUMENTS LAW.....	779
THE ENGLISH BILLS OF EXCHANGE ACT.....	845
INDEX .....	875





## TABLE OF CASES REPORTED.

Where *n* is prefixed to the page number, the case is digested in a note.

	PAGE		PAGE
Adams v. King.....	113	Boston Steel and Iron Co. v. Steuer. . . . .	174
Adams v Wright.....	548	Brick v. Freehold Nat. Bank..	633
Adrian v. McCaskill.....	310	Bristol v. Warner.....	234
Agawam Nat. Bank v. Downing.	593	Brooks v. Elkins..... <i>n</i> .	40
Almich v. Downey.....	161	Brook & Co. v. Vannest.....	276
American Express Co. v. Pinckney. . . . .	195	Brooks v. Higby.....	508
American Nat. Bank v. Junk Bros. . . . .	579	Brown v. Butchers, etc., Bank.	37
American Nat. Bank v. Sprague.	105	Brown v. Curtiss.....	467
Anderton v. Shoup.....	197	Brown v. Jordhal . . . . .	159
Anon (12 Mod. 447).....	643	Brown v. Montgomery.....	435
Armstrong v. National Bank..	123	Brown v. Reed.....	625
Arnd v. Sjoblom.....	383	Brush v. Administrators of Reeves. . . . .	443
Arpin v. Owens.....	250	Bull v. Bank of Kasson.....	83
Atlantic Nat. Bank v. Davis...	772	Burgettstown Nat. Bank v. Nill	582
Aungst v. Creque..... <i>n</i> .	209	Bussell v. Tobin . . . . .	157
Aymar v. Beers . . . . .	684		
Bank of Commerce v. Chambers	571	Campbell Printing, etc., Co. v. Jones. . . . .	194
Bank of England v. Vagliano Bros. . . . .	125	Carlton v. Kenealy . . . . .	72
Bank of Geneva v. Howlett....	566	Carnwright v. Gray.....	716
Bank of Houston v. Day.....	165	Carroll v. Sweet . . . . .	740
Bank of Michigan v. Ely.....	654	Carter v. Union Bank.....	698
Bank of Orleans v. Whittemore.	513	Casco Nat. Bk. v. Clark.....	205
Bank of the Republic v. Millard.	752	Castor v. Peterson..... <i>n</i> .	402
Bank of Rochester v. Gray....	589	Cathell v. Goodwin . . . . .	576
Barnes v. Vaughan.....	512	Caulkins v. Whisler.....	168
Bartlett v. Robinson.....	565	Cayuga, etc., Bank v. Hunt....	694
Beauregard v. Knowlton.....	520	Central R. v. First Nat. Bk...	274
Belden v. Hann.....	269	Challiss v. McCrum . . . . .	427
Biesenthall v. Williams..... <i>n</i> .	45	Chanoine v. Fowler . . . . .	533
Birket v. Elward.....	244	Chapman v. Keane . . . . . <i>n</i> .	535
Bissell v. Dickerson.....	361	Chapman v. Rose.....	391
Bitzer v. Wagar.....	260	Cheever v. Pittsburgh, etc., R..	346
Blake v. Hamilton Dime Savings Bank . . . . .	748	Chemical Nat. Bank of N. Y. v. Kellogg. . . . .	302
Blake v. McMillen.....	517	Chester v. Dorr . . . . .	328
Blenn v. Lyford.....	640	Chestnut v. Chestnut..... <i>n</i> .	194
Boehm v. Garcias.....	677	Chicago Ry. Co. v. Merchants' Bank. . . . .	73
Bolles v. Stearns.....	301	Chipman v. Foster . . . . .	204
Borough of Montvale v. People's Bank. . . . .	352	Choate v. Stevens.....	58
		Chrysler v. Renois.....	85

	PAGE		PAGE
Citizens' Nat. Bk. v. Piollet. . . . .	106	First Nat. Bank, etc. v. Buttery	98
Clark v. Pease. . . . .	370	First Nat. Bank v. Farneman. . .	565
Clarke v. Patrick . . . . .	270	First Nat. Bank v. Forsyth. . . .	335
Cock v. Fellows . . . . .	260	First Nat. Bank v. Lightner. . .	54
Collins v. Driscoll . . . . .	162	First Nat Bank v. Miller. . . . .	79, 558
Columbian Banking Company v. Bowen. . . . .	490	First Nat. Bank v. Slette. . . . .	81
Commercial Nat. Bank v. Zimmerman. . . . .	483	First Nat. Bank of Atchison v. Commercial Savings Bank. . .	651
Commonwealth v. Butterick. . . .	113	First Nat. Bank of Detroit v. Currie. . . . .	748
Continental Life Ins. Co. v. Barber. . . . .	631	First Nat. Bank of Farmersville v. Greenville Nat. Bank. . . . .	82
Cooke v. Horn . . . . .	67	First Nat. Bank of Lisbon v. Bank of Wyndmere . . . . .	403
Cooper v. Dedrick . . . . .	472	First Nat. Bank of Richmond v. Richmond Elec. Co. . . . .	768
Coulter v. Richmond. . . . .	446	Flanders v. Snare . . . . .	35
Critten v. Chemical Nat. Bank. . .	758	Floyd Acceptances, The. . . . .	219
Cromwell v. Hewitt . . . . .	720	Folger v. Chase . . . . .	266
Crouch v. Credit Foncier. . . . .	259	Ford v. Brown. . . . .	355
Currier v. Lockwood. . . . .	42	Fox v. Citizens' Bank. . . . .	354
Curtis v. Sprague . . . . .	144	Frazier v. Massey . . . . .	220
Cushman v. Haynes . . . . .	63	Freeman v. Exchange Bank. . . .	282
Dabney v. Stidger . . . . .	547	Freeman's Nat. Bk. v. Savery. . .	346
Daniels v. Hammond. . . . .	346	Funk v. Babbitt . . . . .	150
Dart v. Sherwood. . . . .	196	Gardner v. Beacon Trust Co. . . .	324
Davis v. Wilkinson. . . . .	90	Gardner v. Maynard. . . . .	639
Davis v. Garr. . . . .	121	Gay v. Rooke . . . . .	37
Davis Sewing Machine Co. v. Best. . . . .	319	Geary v. Physic . . . . .	34
De la Torre v. Barclay. . . . .	586	George Alexander & Co. v. Hazelrigg. . . . .	375
Dennistoun v. Stewart . . . . .	691	George v. Bacon. . . . .	461
De Witt v. Perkins. . . . .	337	German-American Bank, etc., v. Milliman. . . . .	497
Deyo v. Thompson. . . . .	720	Germania Nat. Bk. v. Mariner. .	210
Dilley v. Van Wie. . . . .	63	Gilpin v. Savage . . . . .	510
Dodge v. Emerson . . . . .	60	Gordon v. Anderson. . . . .	115
Dresser v. Missouri, etc., Co. . .	357	Gordon v. Lansing State Bank. .	107
Dunavan v. Flynn. . . . .	650	Gove v. Vining . . . . .	580
Dunn v. O'Keefe. . . . .	587	Gowan v. Jackson . . . . .	575
Dwight v. Pease . . . . .	298	Grange v. Reigh . . . . .	725
Edelman v. Rams. . . . .	715	Greene v. McAuley . . . . .	317
Eldred v. Malloy. . . . .	243	Greenway v. Wm. D. Orthwein Grain Co. . . . .	254
Elgin City Banking Co. v. Zelch. .	265	Gregg v. Beane . . . . .	727
Eng. & Scot. Amer. Mort. etc. Co. v. Globe Loan & Trust Co. .	207	Grey v. Cooper . . . . .	418
Erwin v. Downs . . . . .	434	Grocers' Bank v. Penfield. . . .	243
Evans v. Freeman . . . . .	285	Guerrant v. Guerrant . . . . .	182
Evans v. Gee. . . . .	268	Haddock, Blanchard & Co. v. Haddock. . . . .	458
Emerson v. Gere. . . . .	473	Hall v. Toby . . . . .	263
Fall River Union Bank v. Willard. . . . .	686	Halstead v. Skelton. . . . .	675
Farnsworth v. Allen. . . . .	494		
Fields v. Fields. . . . .	80		

	PAGE		PAGE
Hamilton v. Vought.....	340	Jordan v. Tate.....	97
Hammett v. Brown.....	169	Joseph v. Catron..... <i>n.</i>	106
Hannum v. Richardson.....	432	Joslyn v. Eastman.....	629
Harrisburg Trust Co. v. Shu- feldt.....	477	Josselyn v. Lacier..... <i>n.</i>	50
Harrison v. Nicollet Nat. Bank.	722	Keenan v. Blue..... <i>n.</i>	142
Harrison v. Ruscoe..... <i>n.</i>	535	Keiden v. Winegar.....	201
Hart v. Smith.....	679	Kelley v. Hemmingway.....	103
Haslach v. Wolf..... <i>n.</i>	77	Kimball v. Costa..... <i>n.</i>	194
Hastings v. Thompson.....	74	Kimball v. Huntington..... <i>n.</i>	40
Hatcher v. Stalworth.....	676	King v. Ellor.....	45
Havana Cent. R. Co. v. Knicker- bocker Trust Co..... <i>n.</i>	352	King v. Hurley.....	539
Hays v. Hathorn.....	314	Kinyon v. Wohlford.....	152
Head v. Hornblower.....	743	Laird v. State.....	82
Herrick v. Bennett.....	96	Lancaster v. Baltzell.....	221
Herring v. Woodhull.....	266	Lancey v. Clark.....	597
Hibbs v. Brown..... <i>n.</i>	54	Lane v. Stacey.....	466
Hickok v. Bunting.....	236	Larkin v. Hardenbrook.....	599
Hillsdale College v. Thomas....	151	Leask v. Dew.....	601
Hobbs v. Straine.....	542	Leavitt v. Putnam.....	272
Hodges v. Shuler.....	94	Le Due v. First Nat. Bank of Kasson.....	320
Hoffman v. Bank.....	225	Lent v. Hodgman..... <i>n.</i>	63
Hogue v. Williamson.....	88	Leonard v. Mason.....	91
Holbrook v. Payne.....	644	Lewis v. Clay.....	394
Hook v. Pratt.....	277	Light v. Kingsbury.....	97
Hopps & Co. v. Savage.....	666	Lindenberger v. Beall.....	554
Horn v. Newton City Bank....	608	Linn v. Horton.....	561
Horowitz v. Willowitz.....	437	Little v. Slackford.....	45
Horstatter v. Wilson..... <i>n.</i>	96	Lloyd's Bank, Ltd. v. Cooke...	185
Hoyt v. Lynch.....	44	Lomax v. Picot.....	367
Hughes v. Kiddell.....	267	Long v. Stephenson.....	442
Hull v. Myers.....	577	Lyndonville National Bank v. Fletcher.....	605
Hunter v. Wilson.....	249	Lysaght v. Bryant.....	534
Huntington v. Shute..... <i>n.</i>	238		
Hussey v. Winslow.....	41		
Hyne v. Dewdney..... <i>n.</i>	40		
		MacBeth v. North and South Wales Bank.....	131
Jackson v. Hudson.....	642	McCormick v. Shea.....	628
James v. Wade.....	573	McGregory v. McGregor.....	400
Jarvis v. St. Croix Mfg. Co....	560	McIntosh v. Lytle..... <i>n.</i>	107
Jarvis v. Wilkins..... <i>n.</i>	58	McMann v. Walker.....	401
Jefferson Bank v. Chapman- White-Lyons.....	362	McNeely Co. v. Bank of North America.....	769
Jenkins v. Mackenzie.....	627	Madden v. Gaston.....	191
Jennings v. Roberts..... <i>n.</i>	536	Madison Square Bank v. Pierce.	594
Jerman v. Edwards.....	306	Market and Fulton N. B. v. Sar- gent.....	170
Johnson v. Barrow.....	287	Markey v. Corey.....	261
Johnson v. Buffalo Center State Bank.....	299	Marling v. Jones.....	333
Johnson v. Conklin.....	447	Marshall v. Sonneman.....	530
Johnson v. Haight.....	483	Massachusetts Nat. Bk. v. Snow.	154
Johnson v. Mitchell.....	289	Matteson v. Moulton.....	658
Jones v. Gordon.....	338		

	PAGE		PAGE
Maynard v. Mier.....	79	Parker v. Plymell.....	64
Megowan v. Peterson..... <i>n.</i>	203	Parker v. Reddick.....	488
Mehlberg v. Tisher.....	158	Parsons v. Jackson.....	63
Merrill v. Hurley.....	65	Parsons v. Utica Cement Co...	365
Merritt v. Benton.....	363	Pearce v. Langfit.....	545
Meyer v. Richards.....	419	Petit v. Benson.....	675
Meyer & Co. v. Decroix, Verley et cie.....	668	Peto v. Reynolds..... <i>n.</i>	150
Miller v. Austin.....	43	Phillips v. Mercantile Nat. Bk..	134
Mills v. Bank of U. S.....	539	Pier v. Heinrichshoffen.....	518
Minot v. Russ.....	743	Plato v. Reynolds.....	680
Montgomery v. Elliott.....	478	Plover Savings Bank v. Moodie.	735
Moore v. Cushing.....	459	Power v. Finnie.....	271
Moore v. First Nat. Bank..... <i>n.</i>	277	Putnam v. Crymes.....	122
Moreland's Adm'rs v. Citizens Nat. Bank.....	696	Putnam v. Schuyler.....	474
Morris v. Birmingham Nat. Bk..	523	Railroad Co. v. National Bank..	239
Morris Co. Brick Co. v. Austin..	257	Ranger v. Cary.....	302
Morris v. Husson.....	565	Ransom v. Mack.....	580
Moskowitz v. Deutsch.....	726	Reamer v. Bell.....	268
Munger v. Shannon..... <i>n.</i>	50	Redman v. Adams..... <i>n.</i>	54
Musselman v. Oakes.....	118	Rendall v. Harriman..... <i>n.</i>	201
Nat. Bank of Commonwealth v. Law.....	345	Reg. v. Harper.....	35
National Bank of Michigan v. Green.....	363	Rice v. Stearns.....	284
National Bank of Rolla v. First Nat. Bank of Salem..... <i>n.</i>	410	Richardson v. Carpenter..... <i>n.</i>	49
National Exchange Bank v. Lester.....	616	Richardson v. Ellett.....	195
National Exchange Bank v. Lubrano.....	458	Rider v. Taintor.....	288
Newark, etc., Mfg. Co. v. Bishop	495	Riker v. Sprague Mfg. Co.....	68
Nixon v. Palmer.....	220	Robertson v. Kensington..... <i>n.</i>	287
Noll v. Smith.....	624	Robinson v. Ames.....	681
Northern State Bank of Grand Fork v. Bellamy..... <i>n.</i>	63	Rockfield v. First Nat. Bank of Springfield.....	447
Noxon v. Smith.....	120	Rockville Bank v. Holt.....	629
O'Bannon, J. W. v. Curran.....	527	Ruff v. Webb.....	45
Ohio Life Ins. etc., Co. v. Mc- Cague.....	538	Sackett v. Palmer.....	105
Oothout v. Ballard.....	443	Salley v. Terrill..... <i>n.</i>	153
Oppenheim v. Simon Reigel Cigar Co. ....	256	Saloman v. Pfeister & Vogel Leather Co. ....	541
Osborn v. Hawley.....	93	Saunders v. McCarthy.....	207
Osgood v. Artt.....	307	Schlesinger v. Lehmaier.....	378
Page v. Cook.....	239	Schmittler v. Simon.....	50
Page v. Morrel.....	163	Schmitz v. Hawkeye, etc., Co..	41
Palmer v. Ward..... <i>n.</i>	63	Schofield v. Bayard.....	704
Pardee v. Fish.....	84	Scott v. Calkin.....	270
Parker v. Kellogg.....	515	Sharpe v. Drew.....	685
		Shaw v. Camp.....	102
		Shaw v. McNeill.....	584
		Shaw v. Smith.....	111
		Sheldon v. Benham.....	543
		Shipman v. Bank..... <i>n.</i>	135
		Siegel v. Chicago Trust, etc., Bank.....	55
		Simon v. Merritt.....	360
		Simpson v. Griffin.....	364

	PAGE		PAGE
Simpson v. Turney.....	563	United States v. Barber.....	689
Slade v. Mutrie.....	600		
Smith v. Allen.....	40	Valley Nat. Bk. v. Crowell....	91
Smith v. Bayer.....	280	Van Buskirk v. State Bank of	
Smith v. Crane.....	66	Rocky Ford .....	755
Smith v. Kendall.....	715	Vander Ploeg v. Van Zuuk....	179
Smith v. Prosser.....	171	Violet v. Rose.....	368
Smith v. Poillon.....	556	Vogel v. Starr.....	567
Souhegan Nat. Bank v. Board-			
man. . . . .	214	Walker v. Bank.....	677
Spear v. Pratt.....	648	Walker v. Ebert .....	387
Sprague v. Fletcher..... <i>n.</i>	586	Wallace v. Agry..... <i>n.</i>	684
Stacy v. Kemp.....	253	Wallace v. Tice.....	612
Stafford v. Yates.....	537	Walsh v. Blatchley.....	711
Stagg v. Elliott.....	219	Walton v. Williams.....	649
Stainback v. Bank of Virginia..	559	Waring v. Betts.....	524
Stapleton v. Louisville Banking		Warren v. Smith.....	224
Co. . . . .	78	Watrous v. Hallbrook.....	148
State Bank v. Solomon.....	544	Watson v. Evans.....	119
State Bank of Chicago v. First		Wellington v. Jackson.....	223
Nat. Bank of Omaha.....	409	Wells v. Brigham.....	193
Start v. Tupper.....	734	West Branch State Bank v.	
Stevens v. Androscoggin Water		Haines. . . . .	731
Power Co. . . . .	673	Western Wheeled Scraper Co. v.	
Stewart v. Eden.....	546	McMillen. . . . .	199
Stinson v. Lee.....	516	Wettlaufer v. Baxter.....	145
Stockwell v. Bramble.....	667	Wheeler v. Webster.....	150
Stoddard v. Burton .....	591	White v. Cushing.....	46
Stoddard v. Kimball.....	252	Whitwell v. Johnson.....	554
Sullivan v. Rudisill.....	611	Willard v. Crook.....	221
Sussex Bank v. Baldwin.....	480	Williams v. Tishomingo Sav.	
		Inst. . . . .	433
Taylor v. Dobbins.....	36	Williamsburgh Trust Co. v.	
Taylor v. Snyder..... <i>n.</i>	515	Tum Sudem .....	417
Times Square Auto. Co. v.		Wilson v. Hendee.....	463
Rutherford Nat. Bank.....	746	Wilson v. Peck..... <i>n.</i>	532
Toby v. Maurian .....	516	Wintermute v. Post.....	677
Tombeckbee Bank v. Dumell...	687	Winthrop v. Pepoon.....	690
Traders Nat. Bank v. Jones...	536	Wisner v. Trust Nat. Bank....	660
Troy City Bank v. Lauman....	672	Witte v. Williams.....	114
True v. Fuller.....	471	Witty v. Michigan, etc., Ins. Co.	192
Trust Co. v. National Bank....	263	Wolstenholme v. Smith.....	634
Trust Co. of Amer. v. Hamilton		Worden Grocer Co. v. Blanding.	60
Bank. . . . .	137	Worden v. Dodge.....	49
		Worth v. Case.....	277
Union National Bank v. Marr's		Worthington v. Cowles.....	441
Adm'r. . . . .	573		
United States v. Amer. Exch.		Yale v. Ward.....	646
Nat. Bank. . . . .	439	Zimmerman v. Anderson.....	94



PART I.

**CASES AND AUTHORITIES**



## EXPLANATORY NOTE.

The section numbers opposite the titles of cases and elsewhere refer to the sections of the New York Negotiable Instruments Law. Where cases in other jurisdictions cite the Negotiable Instruments Law, the corresponding sections of the New York Act are given in the footnotes, except where the context renders this cross-reference unnecessary.

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# CASES AND AUTHORITIES

ON

## NEGOTIABLE INSTRUMENTS.

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### ARTICLE I.

#### GENERAL PROVISIONS.

##### I. Codes governing bills, notes and checks.

###### 1. THE ENGLISH BILLS OF EXCHANGE ACT.

A DIGEST OF THE LAW OF BILLS OF EXCHANGE, PROMISSORY NOTES AND CHEQUES. BY M. D. CHALMERS,<sup>1</sup> M. A., OF THE INNER TEMPLE, BARRISTER AT LAW. LONDON, 1878.

[*From the Introduction to the First Edition.*]

As far as form goes, the present Digest is modeled on the Indian Codes. \* \* \* It is almost needless to point out, that the similarity between the Indian Codes and a Digest like the present is merely resemblance in form. There all analogy ends. In a code the subject in hand is treated completely and finally. A code states methodically the law as the legislature is of opinion that it ought to be. This Digest is an attempt to state methodically the law as it is. In a code, propositions and illustrations are alike authoritative. In this Digest, the illustrations taken from decided cases are alone authoritative. The general propositions are only entitled to weight in so far as they are complete and legitimate inductions from decided cases which are unquestioned law. A general proposition, supported by reference to cases, merely amounts to a verifiable hypothesis as to what the law is. In the theory of English law, there exists *in nubibus* a complete set of principles applicable to every conceivable state of facts that can arise. Theoretically the judges do not make law. They only interpret it. They are merely the conductors by which the principle is brought down from the clouds and made available to

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<sup>1</sup> Now his Honor Judge Chalmers.

men. Practically, however, their functions are frequently and of necessity legislative. If a wide subject be investigated systematically, four states of the law will be found to exist. First, the law on a given point may be reasonably certain. All authority, or the great weight of authority, may be in favor of a given proposition. Secondly, a proposition on a given point can only be stated as probably holding good. For instance, it may rest merely on unchallenged *obiter dicta*, or there may be a decision in favor of it, and weighty *obiter dicta* opposed to it. Thirdly, the law on a given point may be uncertain. Decisions may be in direct conflict, or again there may be a decision in point which has never been directly questioned, but the *ratio decidendi* of which seems entirely opposed to the principle of later cases. Fourthly, there may be an entire absence of authority on a given question. Such being the state of the materials available for forming a Digest, it is clear that if the subject is to be treated methodically, many propositions can only be stated tentatively. Many of the articles, therefore, are qualified with a (probably) or a (perhaps), and the reason of the qualification is then stated in a note.

On doubtful points frequent reference is made to American cases and Continental Codes and writers. In mercantile matters when the law is uncertain or authority wanting, there is an increasing tendency to refer to foreign codes and laws in order to see how other nations have solved the difficulty. This is especially the case as regards negotiable instruments, the most cosmopolitan of all contracts. Mr. Justice Story, in his judgment in *Swift v. Tyson* (16 Peters, 1), gives forcible expression to the principle. He says, "The law respecting negotiable instruments may be truly declared, in the language of Cicero, adopted by Lord Mansfield in *Luke v. Lyde* (2 Burr. 887), to be in a great measure, not the law of a single country only, but of the commercial world. *Non erit lex alia Romæ, alia Athenis, alia nunc, alia post hac, sed et apud omnes gentes et omni tempore una eademque lex obtinebit.*"

An American decision, it is needless to say, is not a binding authority in this country, but, if well reasoned, it is always considered with respect by our courts. Many of the American judgments are very valuable as expounding and testing the principles of English decisions. An English case there, like an American case here, is only an authority in so far as it appears to be a correct deduction from the general principles of the common law and the law merchant which prevail in both countries alike.

When the subject matter of an article of this Digest is dealt with by the French "Code de Commerce," or the "German General Exchange Law, 1849," their respective provisions are compared.

*[From the Introduction to the Third Edition.]*

Soon after the publication of the Second Edition of this Digest the law relating to bills, notes, and cheques was codified by the Bills of Exchange Act, 1882. For the most part the propositions of the Act were taken word for word from the propositions of the Digest. In the introduction to the Second Edition it was pointed out that the general propositions of the Digest could only be considered as law, in so far as they were correct and logical inductions from the decided cases which were cited as illustrations. Now the position is reversed. The cases decided before the Act are only law in so far as they can be shown to be correct and logical deductions from the general propositions of the Act. The illustrations, therefore, must always be tested by the language of the Act itself.

In the notes to the Act I have carefully pointed out the few provisions which were deliberately intended to alter the law. When a proposition in the Act appears to be of wide scope, I have added illustrations taken from decided cases. When a proposition appears to be of narrow scope, I have merely given a reference to the cases which were before me when drafting it. It may be said that the Act should be left to speak for itself. I am well aware that there is no necessary connection between the intention of the draftsman and the intention of the Legislature as deduced by the Courts from the terms of a statute. Still, in the present case, there will be a strong disposition on the part of the Courts to construe the Act as declaratory; and it may be useful to the profession to be referred from the abstract propositions of the Act to the concrete facts which gave rise to them. As Mr. Justice Holmes, in his admirable work on the Common Law, observes (p. 27), "However much we may codify the law into a series of seemingly self-sufficient propositions, those propositions will be but a phase in a continuous growth. To understand their scope fully, to know how they will be dealt with by judges trained in the past which the law embodies, we must ourselves know something of that past. The history of what the law has been is necessary to the knowledge of what the law is."

The Bills of Exchange Act, 1882, was the first enactment codifying any branch of the Common Law which found its way into the Statute Book. It has now been followed by the Partnership Act, 1890, which was originally drafted by Sir Frederick Pollock.<sup>2</sup> But as a Code is

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<sup>2</sup> For an account of this Act, see the Introduction to the 5th edition of Pollock on Partnership.

still somewhat of a novelty in the English law, it may be of interest to refer to the conditions under which the experiment was successfully carried out, and to consider how far it can or ought to be repeated as regards other portions of the law. Of late years several attempts at codification have been made but from various causes they have mostly proved unsuccessful. The success of the Bills of Exchange Bill depended on the wise lines laid down by Lord Herschell. He insisted that the Bill should be introduced in a form which did nothing more than codify the existing law, and that all amendments should be left to Parliament. A Bill which merely improves the form, without altering the substance, of the law creates no opposition, and gives very little room for controversy. Of course codification pure and simple is an impossibility. The draftsman comes across doubtful points of law which he must decide one way or the other. Again, voluminous though our case law is, there are occasional gaps which a codifying bill must bridge over if it aims at anything like completeness. Still in drafting the Bills of Exchange Bill my aim was to reproduce as exactly as possible the existing law, whether it seemed good, bad, or indifferent in its effects. The idea of codifying the law of negotiable instruments was first suggested to me by Sir Fitz-James Stephen's Digest of the Law of Evidence, and Sir F. Pollock's Digest of the Law of Partnership. Bills, notes, and cheques seemed to form a well isolated subject, and I therefore set to work to prepare a digest of the law relating to them. I found that the law was contained in some 2,500 cases, and 17 statutory enactments. I read through the whole of the decisions, beginning with the first reported case in 1603. But the cases on the subject were comparatively few and unimportant until the time of Lord Mansfield. The general principles of the law were then settled, and subsequent decisions, though very numerous, have been for the most part illustrations of, or deductions from, the general propositions then laid down. On some points there was a curious dearth of authority. As regards such points I had recourse to American decisions, and to inquiry as to the usages among bankers and merchants. As the result, a good many propositions in the Digest, even on points of frequent occurrence, had to be stated with a (probably) or a (perhaps). Some two years after the publication of my Digest, I read a paper on the question of codifying the law of negotiable instruments before the Institute of Bankers. Mr. John Hollams, the well known commercial lawyer, who was present, pointed out the advantages of a Code to the mercantile community; and, mainly I think on his advice, I received instructions from the Institute of Bankers and the Associated Chambers of Commerce to prepare a bill on the subject. The draft of the bill was first submitted to a

sub-committee of the Council of the Institute of Bankers, who carefully tested such portions of it as dealt with matters of usage uncovered by authority.<sup>3</sup> The bill was then introduced by Sir John Lubbock, the President of the Institute. After it had been read a second time in the Commons, it was referred to a strong Select Committee of merchants, bankers, and lawyers, with Sir Farrer Herschell as chairman.<sup>4</sup> As the Scotch law of negotiable instruments differed in certain particulars from English law, the bill was originally drafted to apply to England and Ireland only. The first work of the Select Committee was to take the evidence of Sheriff Dove-Wilson of Aberdeen, a well-known authority on Scotch Commercial Law. He pointed out the particulars in which the bill, if applied to Scotland, would alter the law there. With three exceptions the points of difference were insignificant. The Committee thereupon resolved to apply the bill to Scotland, and Sheriff Dove-Wilson undertook the drafting of the necessary amendments. Eventually the Scotch rules were in three cases preserved as to Scotland, while on the other points the Scotch rule was either adopted for England, or the English rule applied to Scotland. A few amendments in the law were made when the Committee was unanimous in their favor, but very wisely no amendments were pressed on which there was a difference of opinion. Sir Farrer Herschell reported the bill to the House, and it was read a third time and sent up to the Lords without alteration. In the House of Lords it was again referred to a Select Committee with Lord Bramwell for Chairman.<sup>5</sup> A few amendments were there inserted, mainly at Lord Bramwell's suggestion. These were agreed to by the Commons, and the bill passed without opposition.

The Act has now (1891) been in operation for more than eight years, so that some estimate can be formed as to its results. Merchants and Bankers say that it is a great convenience to them to have the whole of the general principles of the law of bills, notes, and cheques contained in a single Act of 100 sections. As regards particular cases which arise, it is seldom necessary to go beyond the Act itself. It must also be an advantage to foreigners who have English bill transactions to have an authoritative statement of the English law

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<sup>3</sup> Mr. Billingham, of the London and Westminster Bank, and Mr. Slater, of the London and County Bank, undertook the brunt of the work.

<sup>4</sup> The committee included Sir Farrer Herschell, Q. C.; Sir John Lubbock; Mr. Asher, Q. C.; Mr. Cohen, Q. C.; Mr. Reid, Q. C.; Mr. Whitley, Mr. T. C. Baring, Mr. R. B. Martin, Mr. Orr-Ewing, Mr. Jackson, and Sir Charles Mills.

<sup>5</sup> The committee included the Lord Chancellor (Selborne), Lord Bramwell, Lord Fitzgerald, Lord Balfour of Burleigh, and Lord Wolverton.

on the subject in an accessible form. If I could do the work over again, I certainly could do it better and should profit by past experience. But as it is, the Act, as yet, has given rise to very little litigation. I am sure that further codifying measures can be got through Parliament, if those in charge of them will not attempt too much, but will be content to follow the lines laid down by Lord Herschell. Let a codifying bill in the first instance simply reproduce the existing law, however defective. If the defects are patent and glaring, it will be easy to get them amended. If an amendment be opposed, it can be dropped without sacrificing the bill. The form of the law at any rate is improved, and its substance can always be amended by subsequent legislation. If a bill when introduced proposes to effect changes in the law, every clause is looked at askance, and it is sure to encounter opposition.

Assuming then the possibility of further codification, the question arises whether its extension is expedient. All the continental nations have codified their laws, and none of them show any signs of repenting it. On the contrary, most of them are now engaged in remodeling and amplifying their existing codes. In India a good deal of codification has been carried out, and public and professional opinion seems almost unanimous in its favor. The Bills of Exchange Act, 1882, has been adopted by New Zealand, Victoria, New South Wales, South Australia, Queensland, Tasmania, and with slight modifications by Canada.<sup>6</sup>

[From the Preface of the Seventh Edition.]

The Bills of Exchange (Crossed Cheques) Act, 1906, has for the first time amended the Act of 1882. It interprets section 82 of the principal Act, and overrides *Gordon v. London and Midland Bank* (1903), A. C. 242, H. L., in so far as that case turned on the construction of that section. The Bill was drafted by me in 1903, under instructions from Lord Halsbury, but it failed to pass the House of Commons till 1906.

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<sup>6</sup> It has now been adopted by forty of the English colonies and dependencies. See Art. by E. Dove-Wilson, on Codification of Commercial Law, in 8 *Jurid. Rev.* (1896), 329. — H.

[In the 7th edition (1909) of Chalmers' Digest of the Law of Bills of Exchange, etc., the author gives on pages 401-402 a list of forty-three British colonies which have enacted laws relating to bills, notes, and checks, giving also the citation to these laws. He remarks, however, that "The above laws are not necessarily framed on the same lines as the Imperial Act." — C.]

## 2. THE AMERICAN NEGOTIABLE INSTRUMENTS LAW.

LAWS OF NEW YORK, 1890, CHAPTER 205.

§ 1. Within thirty days after the passage of this act, the governor shall appoint, by and with the consent of the senate, three commissioners, who are hereby constituted a board of commissioners by the name and style of "Commissioners for the Promotion of Uniformity of Legislation in the United States." It shall be the duty of said board to examine the subjects of marriage and divorce, insolvency, the form of notarial certificates and other subjects; to ascertain the best means to effect an assimilation and uniformity in the laws of the States, and especially to consider whether it would be wise and practicable for the State of New York to invite the other States of the Union to send representatives to a convention to draft uniform laws to be submitted for the approval and adoption of the several States, and to devise and recommend such other course of action as shall best accomplish the purpose of this act.<sup>7</sup>

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THE NEGOTIABLE INSTRUMENTS LAW. (A REVIEW OF THE AMES-BREWSTER CONTROVERSY.) BY CHARLES L. MCKEEHAN, OF THE PHILADELPHIA BAR. THE AMERICAN LAW REGISTER, VOL. 41, N. S., NOS. 8, 9, 10, AUGUST, SEPTEMBER, OCTOBER, 1902.

[Pages 438-442.]

At the Annual Conference of the Commissioners on Uniform State Laws, held in Detroit in 1895, a resolution was passed requesting the Committee on Commercial Law to procure, as soon as practicable, a draft of a bill relating to commercial paper based upon the English Bills of Exchange Act and upon such sources of information as the Committee might deem proper to consult. The matter was referred to a sub-committee consisting of Judge Lyman D. Brewster, of Connecticut; Henry C. Willcox, of New York, and Frank Bergen, of New Jersey, who secured Mr. John J. Crawford, of the New York bar, a well-known expert on the law of bills and notes, to draft the proposed bill.

The English act had followed the continental codes as to form, *i. e.* it dealt primarily with bills of exchange, and then applied those provisions, so far as they were applicable, to promissory notes, adding provisions which were peculiar to the latter class of instruments. Deeming this form to be unsuited to American conditions — the use

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<sup>7</sup> Similar acts have been passed in many of the American States, and commissioners appointed. — H.



of bills of exchange being proportionately less extensive here than in Europe — Mr. Crawford adopted a form of his own, which grouped together the provisions applicable to all kinds of negotiable instruments, and then collected, under separate articles, the provisions specially affecting the different classes.

Mr. Crawford's draft was laid before the sub-committee, each section being annotated with reference to the decisions of the Courts, the comments of text-book writers, and the statute laws of the several states. This draft (slightly amended by the sub-committee) and the draftsman's notes were printed along with the English bill for comparison, and copies were sent to each member of the Conference, to many prominent lawyers and law professors, and to several English judges and lawyers, with an invitation for suggestions and criticisms. The draft was then submitted to the Conference at Saratoga in 1896. The twenty-seven Commissioners who were in attendance — representing fourteen different states — went over it section by section, and made some amendments to it, "most of which," says Mr. Crawford, "were such changes in the existing law as I had not felt at liberty to incorporate into the original draft."<sup>8</sup> The draft as thus amended was adopted by the Conference, and in such form has been submitted to the various state Legislatures.

The most important contribution that has been made to the act is the Ames-Brewster controversy. In the Fourteenth *Harvard Law Review*, Professor James Barr Ames, Dean of the Harvard Law Faculty, for some years lecturer on Bills and Notes in the Harvard Law School, and the author of the leading case book on the subject, published an article criticising some twenty-three sections of the new act, and expressing the opinion that notwithstanding the act's many merits, "its adoption by fifteen states must be regarded as a misfortune, and its enactment in additional states, without considerable amendment, should be an impossibility." Professor Ames' criticisms were answered by Judge Lyman D. Brewster, President of the National Conference on Uniform State Laws, and a member of the sub-committee which drafted the act. The discussion consists of two articles in the *Harvard Law Review*, by Professor Ames,<sup>9</sup> and two articles by Judge Brewster, one published in the *Yale Law Journal* and one in the *Harvard Law Review*.<sup>1</sup> In a pamphlet recently published by the Harvard Law Review Publishing Association, containing the text of the act, together with these articles, there are added a

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<sup>8</sup> Crawford's An. N. I. L. Preface.

<sup>9</sup> 14 *Harvard Law Review*, 241; 14 *Harvard Law Review*, 442.

<sup>1</sup> 10 *Yale Law Journal*, 84; 15 *Harvard Law Review*, 26.

supplementary note by Professor Ames criticising two additional sections of the act — a reply thereto by Judge Brewster, and a letter containing comments on some points of the discussion by Mr. Arthur Cohen, Q. C., a member of the committee which framed the English act, who was recommended by Judge Chalmers as one of the three best authorities in England on the law of bills and notes.<sup>2</sup>

As Judge Brewster remarks, "No keener weapon than that wielded by the accomplished Dean of the Harvard Law School could be turned against the Negotiable Instruments Law." Professor Ames knows more about the law of bills and notes from the student's standpoint than any one else in this country. Whatever one's conclusions may be as to the soundness of his criticisms, there is little doubt that few, if any, of the vulnerable points in the act have escaped his notice, and that the sections he criticises are those most likely to come up for construction. A familiarity with his criticisms and with Judge Brewster's replies cannot but aid both the bench and bar in giving some sections of the act their proper meaning. This consideration, together with the difficulty of understanding the discussion in its present form, where the criticism of each section, the answer, replication and rejoinder are spread out through four separate articles, has prompted me to write a review of the controversy.

Two general observations may be made, which should be borne in

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<sup>2</sup> The articles contained in the pamphlet referred to, together with Mr. McKeehan's "Review of the Ames-Brewster Controversy," are reprinted in Professor J. D. Brannan's work on the Negotiable Instruments Law, published by the Harvard Law Review Association in 1908.

See also "The Negotiable Instruments Law, a Reply to the Criticisms of James Barr Ames," by John Lawrence Farrell, of the New York bar, in *The Brief of Phi Delta Phi*, Vol. III., No. 2, First Quarter, 1901; and "The Negotiable Instruments Law: Its History and Practical Operation," by Amasa M. Eaton, in *The Michigan Law Review*, Vol. II., No. 4, January, 1904.

See the article by Professor Julian W. Mack in 1 *Ill. Law Rev.* 592 (April, 1907), entitled "Some suggestions on the proposal to enact the 'Uniform Negotiable Instruments Law' in Illinois," advocating certain changes from the Act as drafted by the Commissioners on Uniformity of Laws. This article should be read in connection with the articles on the "Ames-Brewster Controversy" because as Professor Mack says (p. 605), "Many of the changes advocated in the foregoing suggestions are taken from Professor Ames' articles. The reasons in support of them will be found therein and in Mr. McKeehan's pamphlet." Most of these proposed changes were adopted by the Illinois legislature in enacting the Law in that state. See the very instructive article written by Professor L. M. Greeley shortly after the passage of the Illinois act in 2 *Ill. Law Rev.* 145 (October, 1907), explaining the new act and pointing out the changes it effected in the prior law, and Professor Mack's comments on this article in 2 *Ill. Law Rev.* 205. — C.

mind throughout the entire discussion. In the first place, no one can judge the new act fairly who does not realize that the Commissioners were attempting to *codify* the law.<sup>3</sup> Their aim was not to reform the law of negotiable paper. It was to state accurately and concisely the existing law. Of course, here and there it was necessary to choose between two or more conflicting views. Very frequently a section changes the law in a small minority of states which had departed from the almost uniform current of authority. Occasionally, though very rarely and only when there seemed to be no room for a difference of opinion, the law was deliberately changed. But the main, and almost the sole purpose of the framers of the Negotiable Instruments Law was to reproduce, as exactly as possible, that which the great weight of authority had declared to be the law.

Second, in interpreting some sections of the act, the language used must be given not a hyper-literal meaning, but a reasonable legal meaning, derived, to some extent, from a knowledge of the cases on which the sections are based. It would be a great achievement for a code to state the law, in every instance, in language capable of meaning only one thing, even to a man entirely without legal training and unacquainted with what the law was before the code. But it will be a long time before such a code is framed. Of course, in the great majority of instances the Negotiable Instruments Law does this. But it is not a serious reflection on the act that in some instances a familiarity with the cases on which the language of the act is based, is — if not necessary — at least very helpful in deciding what the language means. Indeed, Judge Brewster said to the American Bar Association, in discussing the new act in 1898, "Care has been taken to preserve, as far as possible, the use of words which have had repeated construction by the courts, and have become recognized terms in the law merchant."

With these observations we may proceed to consider the discussion of particular sections.<sup>4</sup>

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<sup>3</sup> The discussion between Professor Ames and Judge Brewster makes no attempt to take up the broad question as to the propriety and utility of codification. For a most learned and able argument against codification, the reader may be referred to a book by R. F. Clarke, Esq., of the New York bar, entitled "The Science of Law, and Law Making." The arguments in favor of at least a partial codification of such a branch of the law as that relating to commercial paper are concisely stated by Judge Brewster in a paper read before the American Bar Association in 1898 on "Uniform State Laws," which is reprinted in the report of the Ninth Conference of the Commissioners for Promoting Uniformity of Legislation in the United States.

<sup>4</sup> A few extracts from Mr. McKeehan's article, discussing certain sections of the Negotiable Instruments Law, will be found hereinafter printed. — C.

## 3. CONTINENTAL CODES.

## CHALMERS' DIGEST OF THE LAW OF BILLS OF EXCHANGE, ETC.

[From the Introduction to the Third Edition.]

The French Code<sup>5</sup> is of particular interest. Although enacted more than eighty years ago, no substantial alteration has been made in it by subsequent legislation. For many years it was the model of nearly all the Continental Codes. For instance, the Belgian Code de Commerce of 1872 enacted for Belgium the provisions of the French Code regarding bills and notes, with a few slight modifications borrowed from Germany, and the addition of three or four articles which embodied the result of French judicial decisions on the construction of the Code. Of late years, however, there has been a tendency to adopt the somewhat wider provisions of the German Exchange Law. Until 1883 the Italian Commercial Code was closely modeled on the French, but the new Italian Code which came into force in 1883 has departed from the French model as regards bills and notes, and has substantially adopted the provisions of the German Exchange Law. Again, the Portuguese Code of 1833 was mainly founded on the French Code. But the Code of 1888 in many respects departs from the French model, and has in the main followed the German Exchange Law, though a few provisions seemed to be borrowed from the English Act. I believe the Hungarian Code of 1875, the Scandinavian laws of 1880, the Swiss law of 1881, and the Spanish Code of 1885 have also departed from the French idea and followed the German lead. French law is worthy of attention in another respect. In the absence of English authority, our Courts have, in some instances, consciously taken it as their guide. (See per Parke, B., in *Foster v. Dawber*, 6 Exch. 852.) The "Code de Commerce," to a great extent, embodies and enacts the opinions of Pothier, whose authority, says Best, C. J. (in *Cox v. Troy*, 5 B. & Ald. 481), "is as high as can be had next to the decision of a Court of Justice in this country." On doubtful points not dealt with by the Code, reference is occasionally made to Pothier, and also to the exhaustive treatise of M. Nougier (*Des Lettres de Change et des Effets de Commerce*, 4th ed. 1875), which gives the latest results of French law.

The German General Exchange Law of 1849 (slightly modified, 1869), is important in two respects. First, it is the most elaborate and carefully worked out of the foreign codes, and it appears to be the model to which the other continental states (with the exception of France) are now assimilating their laws. Secondly, it is an interna-

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<sup>5</sup> Code de Commerce, 1807. This is available in translation in a work by L. Goiraud on the French Code of Commerce, London, 1880. Articles 110-189 deal with bills and notes. Checks are dealt with in separate Acts (1865 & 1874).—H.

tional and not merely a national Code. All the German States, including Austria, have adopted it, and the terms of its adoption are these: Each State is at liberty to supplement it by additional laws of its own, but such laws are not in any way to contradict or override it. M. Nouguiet, in the work above referred to, gives in French the text of the Exchange Law, and also the various supplementary laws passed by the different States.<sup>6</sup>

It would probably be very advantageous to the commercial world if this principle of an International Code could be further extended. The difficulties of carrying it out do not seem insuperable, though, doubtless, they would be great. The provisions of such a Code would have to be settled by agreement, and then each State would enact it for its own territory. In the case of England it would probably be necessary to confine its operation to foreign bills, that is to say, to bills drawn or payable abroad. Our law, as regards foreign bills, does not widely diverge from the law of other commercial countries, and it diverges chiefly by allowing greater latitude than is adopted in practice.

Occasional reference is also made to the Indian Code (Act XXVI, of 1881, as amended by Act II of 1885) which in substance reproduces the English law as it stood in 1881. In a work like the present, it is thought it would be waste of space to carry references to foreign laws or authorities any further, but it may be worth while to mention where they can be found.

Borchardt (*Vollständige Sammlung der geltenden Wechsel-und Handels Gesetze aller Länder*, 1871), collects the statutory enactments of all countries relating to Bills of Exchange. Part I gives a German translation, Part II the original text. More than forty countries have codified their law on this subject; in fact, some English colonies and the United States seem to be the only civilized nations which have not done so. Since Borchardt's work was published, however, several continental states have re-cast their laws relating to negotiable instruments. A new Commercial Code has been enacted for the Netherlands, and an official translation of the part relating to negotiable instruments has been published in England. [See *Commercial*, No. 30, of 1880, c. 2609.] M. Nouguiet, in a supplementary chapter to his work on Bills (*Des Lettres de Change*, 1875), compares the laws of the chief commercial nations with the French Code. The Comité de Législation Etrangère, under the direction of the French Ministry of Justice, are preparing cheap French translations of the various foreign laws relating to commercial matters. Several volumes have already been published with excel-

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<sup>6</sup> See Art. by E. Schuster on the German Civil Code, 12 *Law Q. R.* (1896), 17. — H.

lent introductions and notes. Having regard to our own insular isolation, I fear it will be long before any English government department undertakes similar useful work. M. Massé's "*Droit Commercial et des Gens*" is a valuable work on the conflict of laws, especially as regards bills.

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## II. Construction of codifying statutes.

### BANK OF ENGLAND *v.* VAGLIANO BROTHERS.

[*Reported herein at p. 125.*]

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## III. The law merchant.

### I. THE LAW MERCHANT AND ITS HISTORY.

THE ELEMENTS OF MERCANTILE LAW. BY THOMAS EDWARD SCRUTTON.  
LONDON, 1891.

[*From Chapter I.*]

[Books recommended.—The best, and almost the only satisfactory sketch of the history of the Law Merchant with which I am acquainted, is the introduction prefixed by Master Macdonell to the tenth edition of Smith's *Mercantile Law*. See also the Prefaces to Chalmers on Bills of Exchange, and Lowndes on Marine Insurance; and Scrutton on the Influence of the Roman Law on the Law of England, chapters xiii, xiv.]

#### I.

The fact that so wide a meaning is given \* \* \* to the term "Common Law," may properly call your attention to the different meanings that the term "Common Law," itself has. In the first place "Common Law" is used in distinction to "Equity." The Common Law alone was administered by the King's Courts in this country, and suitors who complained of the rules of the law addressed petitions to the King, as the fountain of justice, asking for "Equity." The King, if he had time or inclination, dealt with these petitions himself; but when, as generally happened, he had not time or inclination, he referred them to his Chancellor, and the Chancellor dealt out "Equity" to petitioners injured by the stringent rules of the Common Law. The Equity administered at first was variable; as Selden said, it "varied with the length of the Chancellor's foot," but by degrees Equity itself came to settle down to rigid rules, until with the same case you might know beforehand that you would be successful on the Common Law side of Westminster Hall and unsuc-

cessful on the Equity side. At last under the Judicature Act<sup>7</sup> the rules of Equity prevailed over the rules of Common Law, and the distinction became abolished except in as far as certain subjects were assigned to the Court of Chancery, and that certain subjects were assigned to the Queen's Bench Division.

A second meaning of the term "Common Law" is when it is used in opposition to "Statute Law." In that sense Common Law is the unwritten law of the kingdom which exists *in gremio legis*, in the bosom of the judges, which they bring forth from that mysterious recess when new points have to be dealt with; while the Statute Law is the written law of the kingdom as it has been laid down by the Legislature in Acts of Parliament.

Another sense in which the term "Common Law" is used is when it is distinguished from the "Civil Law," and in that sense the Common Law is the law of England; the Civil Law is the law of those countries who have founded their system upon the Roman Law. For instance, if you go north of the Border to Scotland, you find a system administered differing from the Law of England, and founded upon the Civil Law. If you cross the Atlantic to the United States you find the States in the North, such as Massachusetts, administering a system founded on Common Law; and if you go to Louisiana, in the South, you find a system founded on the old Roman Law, and known as a Civil Law system.

## II.

There was yet another distinction which leads me to the subject of this course of lectures. If you read the law reports of the seventeenth century you will be struck with one very remarkable fact; either Englishmen of that day did not engage in commerce, or they appear not to have been litigious people in commercial matters, each of which alternatives appears improbable. But it is a curious fact that one finds in the reports of that century, two hundred years ago, hardly any commercial cases. If one looks up the Law of Bills of Exchange, "the cases on the subject are comparatively few and unimportant till the time of Lord Mansfield."<sup>8</sup> If you turn to Policies of Insurance, and to the work of Mr. Justice Park on the subject published at the beginning of this century, you find him saying: "I am sure I rather go beyond bounds if I assert that in all our reports from the reign of Queen Elizabeth to the year 1756 when Lord Mansfield became Chief Justice of the King's Bench, there are sixty cases upon matters of insurance."<sup>9</sup> If you come

<sup>7</sup> 36 and 37 Vic. c. 66, § 5, ss. 11.

<sup>8</sup> Chalmers. Bills, Pref. p. 36.

<sup>9</sup> Park, I. Pref. 43.

to Charter Parties and Bills of Lading, which have always been productive of litigation, you find Sir John Davies in the seventeenth century saying that "until he understood the difference between the Law of Merchants and the Common Law of England, he did not a little marvel what should be the cause that in the books of the Common Law of England there should be found so few cases concerning merchants and ships, but now the reason was apparent, for that the Common Law did leave these cases to be ruled by another law, the Law Merchant, which is a branch of the Law of Nations."<sup>1</sup>

The reason why there were hardly any cases dealing with commercial matters in the Reports of the Common Law Courts is that such cases were dealt with by special Courts and under a special law. That law was an old established law and largely based on mercantile customs. Gerard Malynes, who wrote the first work on the Merchant Law in England, called his book, published in 1622, "*Consuetudo vel Lex Mercatoria*," or the Ancient Law Merchant; and he said in his preface: "I have entituled the book according to the ancient name of *Lex Mercatoria* and not *Jus Mercatorum*, because it is a customary law approved by the authority of all kingdoms and commonweales, and not a law established by the sovereignty of any prince." And Blackstone, in the middle of the last century, says: "The affairs of commerce are regulated by a law of their own called the Law Merchant or *Lex Mercatoria*, which all nations agree in and take notice of, and it is particularly held to be a part of the law of England which decides the causes of merchants by the general rules which obtain in all commercial countries, and that often even in matters relating to domestic trade, as for instance, in the drawing, the acceptance, and the transfer of Bills of Exchange."<sup>2</sup> Later than Blackstone, Lord Mansfield lays down that "Mercantile Law is not the law of a particular country, but the law of all nations;"<sup>3</sup> while so recently as 1883 you find Lord Blackburn saying in the House of Lords that "the general Law Merchant for many years has in all countries caused Bills of Exchange to be negotiable; there are in some cases differences and peculiarities which by the municipal law of each country are grafted on it, but the general rules of the Law Merchant are the same in all countries."<sup>4</sup>

### III.

Now if we follow the growth of this Law Merchant or Mercantile Law, which was two hundred years ago so distinct from the Com-

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<sup>1</sup> Zouch, Jurisdiction of the Admiralty (1686), p. 89.

<sup>2</sup> Blackstone, Commentaries, I. 273; IV. 67.

<sup>3</sup> *Luke v. Lyde*, 2 Burr. at p. 887.

<sup>4</sup> *M'Lean v. Clydesdale Bank*, 9 App. C., at p. 105.



mon Law, we find it in England going through three stages of development.<sup>5</sup> The first stage may be fixed as ending at the appointment of Coke as Lord Chief Justice in the year 1606, and before that time you will find the Law Merchant as a special law administered by special Courts for a special class of people.

In the first place as to the special Courts. The greater part of the foreign trade of England, and indeed of the whole of Europe at that time, was conducted in the great fairs, held at fixed places and fixed times in each year, to which merchants of all countries came; fairs very similar to those which meet every year at the present time at Novgorod in Russia, and at other places in the East. In England, also, there were then the great fairs of Winchester and Stourbridge, and the fairs of Besançon and Lyons in France, and in each of those fairs a court sat to administer speedy justice by the Law Merchant to the merchants who congregated in the fairs, and in case of doubt and difficulty to have that law declared on the basis of mercantile customs by the merchants who were present. You will find this Court mentioned in the old English law books as the Court *Pepoudrous*, so called because justice was administered "while the dust fell from the feet," so quick were the Courts supposed to be. "This Court is incident to every fair and market because that for contracts and injuries done concerning the fair or market there shall be as speedy justice done for advancement of trade and traffic as the dust can fall from the feet, the proceeding there being *de hora in horam*."<sup>6</sup> Indeed, so far back as Bracton in the thirteenth century, it had been recognised that there were certain classes of people "who ought to have swift justice, such as merchants, to whom justice is given in the Court Pepoudrous."<sup>7</sup> The records of these Courts are few, for obviously in Courts for rapid business law reporters were rather at a discount. As a consequence, "there is no part of the history of English law more obscure than that connected with the maxim that the Law Merchant is part of the law of the land."<sup>8</sup> We are, however, fortunate enough to have one or two records of the Courts of the Fairs. The Selden Society has succeeded in unearthing the Abbott's roll of the fair of St. Ives held in 1275 and 1291,<sup>9</sup> containing a series of cases which show how the merchants administered the Law Merchant in the Courts of the fair, and why such cases did not come into the King's Court. For instance:—"Thomas, of Wells, complains of Adam Garsop that

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<sup>5</sup> Macdonell, Preface to Smith's Mercantile Law, p. 82.

<sup>6</sup> Coke, Inst. IV. 272. ["Pypowder" courts appartenant to fairs were authorized in New York in 1692.—1 Col. Laws (ed. 1894), p. 298.—H.]

<sup>7</sup> Bracton, f. 334.

<sup>8</sup> Blackburn on Sale 1st Ed. p. 207.

<sup>9</sup> Selden Society, Vol. II. pp. 130 *et seq.*

he unjustly detains and deforces from him a coffer which the said Adam sold to him on Wednesday next after Mid Lent last past for sixpence, whereof he paid to the said Adam twopence and a drink in advance"—(it appears to have been a very good mercantile custom, still existing, to "wet a bargain," and the drink was a matter to which great importance was attached by the merchants present); "and on the Octave of Easter came and would have paid the rest, but the said Adam would not receive it nor answer for the said coffer, but detained it unconditionally to his damage and dishonour, 2s., and he produces suit. The said Adam is present and does not defend. Therefore let him make satisfaction to the said Thomas and be in mercy for the unjust detainer; fine 6d.; pledge his overcoat." The next defendant was not so fortunate so as to have an overcoat. "Reginald Picard of Stamford came and confessed by his own mouth that he sold to Peter Redhood of London a ring of brass for 5½d., saying that the said ring was of the purest gold, and that he and a one-eyed man found it on the last Sunday in the churchyard of St. Ives, near the cross." (One fancies one has heard that tale about the brass ring before.) "Therefore it is considered that the said Reginald do make satisfaction to the said Peter for the 5½d. and be in mercy for the trespass; he is poor; pledge his body." The next case introduces the Law Merchant. "Nicolas Legge complains of Nicolas of Mildenhall for that unjustly he impedes him from having, *according to the usage of merchants*, part in a certain ox which Nicolas of Mildenhall bought in his presence in the village of St. Ives on Monday last past to his damage 2s., whereas he was ready to pay half the price, which price was 2s. 6d. And Nicolas of Mildenhall defends, and says that the Law Merchant does well allow that every merchant may participate in a bargain in the butcher's trade if he claim a part thereof at the time of the sale; but to prove that the said Nicolas Legge was not present at the time of the purchase nor claimed a part thereof he is ready to make law." Then they went to the proof. The custom of the Law Merchant relied on admitted any merchant standing by to claim a share in any bargain on paying a share of the price. The defence is, "You were not there, so you cannot claim." The next and last case is one which puzzled the Court; and therefore I omit the details, but it is recited in the Abbott's roll: "And the case is respited till it shall be more thoroughly discussed by the merchants. And the merchants of the various commonalties and others being convoked in full Court it is considered"—and then they go on to discuss it. There you see the Merchants' Court at work, giving quick justice in all mercantile disputes, and in cases of doubt calling upon the merchants present to declare what the Law Merchant is. So much for the fairs.

In most seaport towns also you will find a similar Court dealing

with cases arising out of ships. In the Domesday Book of Ipswich<sup>1</sup> it is stated, "The pleas between strange folk that men call 'pypoudrous' should be pleaded from day to day. The pleas in time of fair between stranger and passer should be pleaded from hour to hour, as well in the forenoon as in the afternoon, and that is to wit of complaints begun in the same time of fair, and the pleas given to the law marine for strange mariners passing, and for them that abide not but their tide, should be pleaded from tide to tide." Any ship coming into the port of Ipswich with a dispute about its Charter Party or Bill of Lading may get summary justice at once from this Court at Ipswich between tide and tide. Stress may be laid on the fact that the Courts sat in the afternoon, because at that time the King's Courts only sat from eight in the morning till eleven and then adjourned for the rest of the day. "For in the afternoons these Courts are not holden. But the suitors then resort to the perusing of their writings, and elsewhere consulting with the sergeants-at-law and other their counsellors,"<sup>2</sup> so that the time taken up in consultation by the Courts in London was taken up by the Courts at Ipswich in dealing summarily with cases, and letting the strange mariners go who were only waiting for their tide.

There were special Courts by statute, of which a number of "grave and discreet merchants" were necessary members, in order that the Mercantile Law founded on the custom of merchants might be duly applied to the case before them.<sup>3</sup> The law which these Courts administered was what was called by merchants the Law Merchant and Law of the Sea, and it was common to nearly every European country. Much of it was to be found in a series of codes of Sea Laws, such as the Laws of Oleron and Wisbury, and the Consolato del Mare, embodying the customs and practices of merchants of different countries, and it was not the Common Law of England. Further, it was only for a particular class. You had to show yourself to be a merchant before you got into the Mercantile Court; and until about two hundred years ago it was still necessary to show yourself to be a merchant in the Common Law Courts before you could get the benefit of the Law Merchant.<sup>4</sup>

#### IV.

Now the second stage of development of the Law Merchant may be dated from Lord Coke's taking office in 1606, and lasts until the

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<sup>1</sup> Black Book of Admiralty, Rolls Series, II. 23.

<sup>2</sup> Sir J. Fortescue.

<sup>3</sup> *E. g.* the Court established by 43 Eliz. c. 12, of which eight "grave and discreet merchants" were to be members, who were to determine all insurance cases in a brief and summary course, without formalities of pleadings or proceedings.

<sup>4</sup> *Vide post*, pp. 29, 30. [Herein at p. 27. — H.]

time when Lord Mansfield became Chief Justice in 1756, and during that time the peculiarity of its development is this: That the special Courts die out, and the Law Merchant is administered by the King's Courts of Common Law, but it is administered as a custom and not as law, and at first the custom only applies if the plaintiff or defendant is proved to be a merchant. In every action on a Bill of Exchange it was necessary formally to plead "secundum usum et consuetudinem Mercatorum"—according to the use and custom of merchants;<sup>5</sup> and it was sometimes pleaded that the plaintiff was not a merchant but a gentleman.<sup>6</sup> And as the Law Merchant was considered as custom, it was the habit to leave the custom and the facts to the jury without any directions in point of law, with a result that cases were rarely reported as laying down any particular rule, because it was almost impossible to separate the custom from the facts; as a result little was done towards building up any system of Mercantile Law in England.

## V.

The construction of that system began with the accession of Lord Mansfield to the Chief Justiceship of the King's Bench in 1756, and the result of his administration of the law in the Court for thirty years was to build up a system of law as part of the Common Law, embodying and giving form to the existing customs of merchants. When he retired after his thirty years of office, Mr. Justice Buller paid a great tribute to the service that he had done. In giving judgment in *Lickbarrow v. Mason*,<sup>7</sup> he said: "Thus the matter stood till within these thirty years. Since that time the Commercial Law of this country has taken a very different turn from what it did before. Lord Hardwicke himself was proceeding with great caution, not establishing any general principle, but decreeing on all the circumstances put together. Before that period we find in Courts of Law all the evidence in mercantile cases was thrown together; they were left generally to the jury, and they produced no established principle. From that time we all know the great study has been to find some certain general principle, not only to rule the particular case under consideration, but to serve as a guide for the future. Most of us have heard those principles stated, reasoned upon, enlarged, and explained till we have been lost in admiration at the strength and stretch of the human understanding, and I should be sorry to find myself under the necessity of differing from Lord Mansfield, who may truly be said to

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<sup>5</sup> Chalmers, Bills, Pref. 44.

<sup>6</sup> Cf. *Sarsfield v. Witherby* (1692), Carthew, 82.

<sup>7</sup> 2 T. R. 73.

be the founder of the Commercial Law of this country." Lord Mansfield, with a Scotch training, was not too favourable to the Common Law of England, and he derived many of the principles of Mercantile Law, that he laid down, from the writings of foreign jurists, as embodying the custom of merchants all over Europe. For instance, in his great judgment in *Luke v. Lyde*,<sup>8</sup> which raised a question of the freight due for goods lost at sea, he cited the Roman Pandects, the Consolato del Mare, laws of Wisbury and Oleron, two English and two foreign mercantile writers, and the French Ordinances, and deduced from them the principle which has since been part of the Law of England.<sup>9</sup> While he obtained his legal principles from those sources, he took his customs of trade and his facts from Mercantile Special Juries, whom he very carefully directed on the law; and Lord Campbell, in his life of Lord Mansfield, has left an account of Lord Mansfield's procedure. He says:<sup>1</sup> "Lord Mansfield reared a body of special jurymen at Guildhall, who were generally returned on all commercial cases to be tried there. He was on terms of the most familiar intercourse with them, not only conversing freely with them in Court, but inviting them to dine with him. From them he learned the usages of trade, and in return he took great pains in explaining to them the principles of jurisprudence by which they were to be guided. Several of these gentlemen survived when I began to attend Guildhall as a student, and were designated and honoured as 'Lord Mansfield's jurymen.' One in particular I remember, Mr. Edward Vaux, who always wore a cocked hat, and had almost as much authority as the Lord Chief Justice himself."

Since the time of Lord Mansfield other judges have carried on the work that he began, notably Abbott, Lord Chief Justice, afterwards Lord Tenterden, the author of "Abbott on Shipping," Mr. Justice Lawrence, and the late Mr. Justice Willes; and as the result of their labours the English Law is now provided with a fairly complete code of mercantile rules, and is consequently inclined to disregard the practice of other countries. In Lord Mansfield's time it would have been a strong argument to urge that all other countries had adopted a particular rule; at the present time English Courts are not alarmed by the fact that the law they administer differs from the law of other countries. In a recent case before the Court of Appeal, Lord Esher says:<sup>2</sup> "It was urged that even if the

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<sup>8</sup> 2 Burr. 883.

<sup>9</sup> Cf. the judgment of Willes, J., in *Dakin v. Oxley*, 15 C. B. N. S. 646, for similar authorities.

<sup>1</sup> Campbell's Lives of the Lord Chief Justices, II. 407, note.

<sup>2</sup> *Svensen v. Wallace*, 13 Q. B. D. 73, cf. per Willes, J. in *Lloyd v. Guibert*, L. R. 1 Q. B. 119, 123.

proposition is stated in terms larger than have hitherto been recognised in English Law, yet it ought now to be adopted in order to bring the principle of English Law on the subject into consonance with the laws of all other countries. But to this I cannot agree. It is useless to inquire whether the law is, as stated, the same in all European countries. For if it is, yet no English Court has any mission to adapt the Law of England to the laws of other countries; it has authority only to declare what the Law of England is." Lord Mansfield would have found out what the Law of England in mercantile matters was by considering what was the law of other countries, if there was no English decision laying down any clear rule. The Courts of the present day in the wealth of English commercial law, feel entitled to disregard the law of other countries.

## VI.

Further than this, the Law Merchant, which was originally based upon the usage of merchants, can now be extended by new usages which have sprung up, may be constantly added to by proof of fresh usages of the mercantile world. That is very clearly and strongly laid down in the case of *Goodwin v. Roberts*.<sup>3</sup> It was a case involving the question whether a particular form of debenture scrip was negotiable, and it was alleged that by the custom of merchants it had been so for the last twenty years. It was answered to that, relying upon the judgment of Mr. Justice Blackburn,<sup>4</sup> that no addition could be made to the Law Merchant by so recent a usage as twenty years, but that it must be shown to be part of the ancient Law Merchant; but Chief Justice Cockburn, in delivering the judgment of the Court of Exchequer Chamber in *Goodwin v. Roberts*, said: "Having given the fullest consideration to this argument, we are of opinion that it cannot prevail. It is founded on the view that the Law Merchant is fixed and stereotyped, and incapable of being enlarged so as to meet the wants and requirements of trade in the varying circumstances of commerce. It is true that Law Merchant is sometimes spoken of as a fixed body of law forming part of the law, and, as it were, coeval with it, but as a matter of legal history this view is altogether incorrect. \* \* \* The Law Merchant is of comparatively recent origin; it is neither more or less than the usages of merchants and traders in the different departments of trade ratified by the decisions of the Courts of Law, which, upon such usages being proven before them, have adopted them as settled law with a view to the interests of trade and public convenience, the Court proceeding herein on the well-known principle of law that, with

<sup>3</sup> L. R. 10 Ex. 346, 352.

<sup>4</sup> *Crouch v. Credit Foncier*, L. R. 8 Q. B. 386.

respect to transactions in the different departments of trade, Courts of Law, in giving effect to the contracts and dealings of the parties, will assume that the latter have dealt with one another on the footing of any custom or usage prevailing in that particular department." Thus it is that Courts of Law continually take notice of customs of trade, only to the word "customs" they give a much wider meaning than it bears in the Common Law. A well-known lawyer said rather cynically once that he had heard a good many customs found by juries, but he had never heard one proved yet; and it is so that the evidence on which a mercantile jury, who know a great deal more about the matter than the lawyers or witnesses, very often will find that a custom exists, is such as would not suffice to establish any custom under the strict rules of the Common Law.

For, according to the Common Law a custom must have six attributes. In the first place it must date from time immemorial, which has been conveniently fixed by the Common Law as when our Lord Richard returned from Palestine, in 1189. Now, obviously, when our Lord Richard returned from Palestine, the amount of mercantile custom existing in England was of the very slightest description, and if one is to trace all one's mercantile customs back to his return from Palestine, or if a custom is liable to be defeated by proof of a later origin, very few mercantile customs can possibly be proved. The custom must be continuous from that date in the second place. In the third place it must be universally acquiesced in. In the fourth place it must be reasonable. In the fifth place it must be certain; and in the last place it must be binding. Now in proving a mercantile custom you can dispense with our Lord Richard at once; it is sufficient for you to prove that the custom is certain, so that people know what it is; that it is reasonable; that it is fairly universal (of course it is not quite universal, because somebody is disputing it in the action in question); that it has existed for some time (five years may suffice); and that merchants in the trade consider it binding; and on those lines the law is continually being added to by the finding of customs by special juries.

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## 2. HISTORY OF NEGOTIABLE INSTRUMENTS.

### (a) *Bills, notes and checks.*

SCRUTTON. ELEMENTS OF MERCANTILE LAW. 1891.

[From Chapter II.]

[For authorities, see the Preface to Mr. Chalmers' work on Bills of Exchange; the notes to *Miller v. Race* in 1 Smith's Leading Cases,

9th ed. p. 491; and the judgment of Cockburn, C. J., in *Goodwin v. Roberts*, L. R. 10 Ex. 346.]

Many of the rules of Mercantile Law, the Law Merchant, are directed to evade inconvenient rules of the Common Law.

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Another rule of the Common Law which is found inconvenient by merchants is the old rule that a "chose in action" is not transferable. A "chose in action" is a right to recover a thing, as distinguished from the thing itself. A bill of lading, as distinguished from the goods it represents, is such a "chose in action." If you [X.] had a right to recover property from A., and wanted to assign that right to B., so that B. could recover such property from A., you could not do it by the old common law. Equity would have recognised that you had transferred the right to B., but even then B. must bring his action in the name of X., who had given him the right; he could not sue in his own name. And further, when the "chose in action" was transferred, such a transfer passed no better title than the transferor had. Now the Law Merchant dealt with many "choses in action," and it would have been very inconvenient, for instance, that the man who took a bill of exchange should not be able to sue on it in his own name, but should have to sue in the name of the man whose name was mentioned as payee in the bill of exchange. It would have been slightly inconvenient that the indorsee of a bill of exchange should have to inquire into the title of all previous indorsers, to see that there was no defect in any of their titles. As a result the Law Merchant establishes certain instruments or "choses in action," which were transferable by delivery or indorsement, so that the holder could sue in his own name, and which passed a good title to a transferee who took them in good faith, notwithstanding that the transferor or his predecessors had no title. These documents had thus two distinguishing features: They could be sued on by the holder in his own name; and they were not affected by previous lack of title; and instruments of this class are called Negotiable Instruments.<sup>5</sup> To illustrate the general doctrine I have been explaining to you, a bill of exchange is by the custom of merchants transferable either by delivery, if it is to bearer, or by indorsement, if it is to order, and the indorsee or person who takes it can sue in his own name, and is not affected by the fact of previous want of title in an indorser if he was not a party to that defect.

The indorsement of a bill of lading by the custom of merchants passes such property in the goods represented by it as it was intended

<sup>5</sup> See the leading case of *Miller v. Race*, 1 Smith L. C. 9th ed. 491, and *per Bowen*, L. J., in *Picker v. London and County Bank*, 18 Q. B. D. 519.



to pass;<sup>6</sup> but it needed a statute, the Bills of Lading Act,<sup>7</sup> to get a further effect and allow a holder of a bill of lading to sue in his own name on the contract contained in the bill of lading. Thus the bill of lading obtained a similar position to that of a negotiable instrument by the double effect of the custom of merchants and of the statute. A policy of insurance does not by assignment pass goods insured under it, although the assignee may by statute sue in his own name, and therefore it is not a complete negotiable instrument. For to make a negotiable instrument you must have two marks; that the holder gets a title, though his transferor had no title, and that the holder can sue in his own name—each of these marks meeting one of the rules of the Common Law already referred to.

The law of negotiable instruments is, with some few exceptions depending on statutes, entirely built upon the custom of merchants, and the history of that law as applied to particular classes of instruments you will find best stated in the judgment of Lord Chief Justice Cockburn in *Goodwin v. Roberts*,<sup>8</sup> which I recommend to your careful reading. The earliest form of negotiable instrument was the bill of exchange.<sup>9</sup> Originally bills of exchange were used solely for the purpose of foreign trade. It was an instrument by which an English merchant contrived to avoid sending money out of the country or bringing money into the country by giving an order on his foreign debtor to pay a third person, or by accepting an order to pay a third person from his foreign creditor.<sup>1</sup> It was purely a trade transaction for the purpose of avoiding sending money out of the country, and the French Law has adhered to that idea of a bill of exchange to this day, and treats it merely as a trade transaction. The English Law has treated it as an instrument of credit. Bills of exchange seem to have been introduced into England by the Venetians or Florentines, and there were bills of exchange for foreign trade known to England as early as the reign of Richard II. The first reported case in the English Courts is in the year 1603,<sup>2</sup> and the Courts, in developing what was originally simply a bill in a transaction of foreign trade, have followed the custom of merchants. Chief Justice Treby, in the case of *Bromwich v. Lloyd*,<sup>3</sup> explained the stages by which a bill of exchange was developed. "Bills of Exchange," he said, "at first extended only to merchant strangers

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<sup>6</sup> *Vide post*, p. 153.

<sup>7</sup> 18 & 19 Vic. c. 111.

<sup>8</sup> L. R. 10 Ex. 346.

<sup>9</sup> Defined in Bills of Exchange Act, 1882, § 3, and *post*, pp. 40, 41.

<sup>1</sup> See Chalmers, Bills, Pref. p. 46.

<sup>2</sup> *Martin v. Boure*, Cro. Jac. 6.

<sup>3</sup> (1698) 2 Lutwyche's Reports, p. 1585.

trafficking with English merchants; and afterwards to inland bills between merchants trafficking the one with the other in England; and afterwards to all traders, and then to all persons whether traders or not; and there was then no need to allege any custom of merchants." So beginning with the necessity to allege an English merchant and a foreign merchant, you dispense with the foreign merchant and allege two English merchants trading; then you dispense with the particular transaction of trade; then you drop the trader, or the allegation that there is any merchant at all, and simply produce the bill. But in a case in 1613<sup>4</sup> there was a plea that an acceptor of a bill of exchange was not a merchant, and it was held a good answer. A bill of exchange could not be made at that time by people who were not merchants. In 1692, however, the Courts had got a little further.<sup>5</sup> There was a plea then that the acceptor of a bill of exchange was a gentleman and not a merchant, and the Court of Queen's Bench, following the earlier case, held that a good defense; but the Court of Appeal, the Exchequer Chamber, reversed the decision, "having consideration to the inconvenience that might ensue and the suspicion which might increase among foreign merchants," and they laid down very sensibly that if "gentlemen" took upon themselves to accept bills they ought to pay them. The custom of merchants has gone on developing bills of exchange until the law with regard to them is now all but settled; they pass by indorsement or delivery the right to the indorsee to sue in his own name; they pass title to a *bona fide* holder for value though the indorser's title is bad; and it is not necessary to allege any consideration for the bill, for consideration is presumed until the contrary is proved. The only trace of the former history of bills of exchange is the difference between inland and foreign bills of exchange, which is, in the words of Lord Holt, "All the difference between foreign and inland bills is that foreign bills must be protested before a notary before the drawer can be charged; but inland bills need no protest,"<sup>6</sup> notice of dishonor being sufficient.

The next document which obtained the features of negotiability was a promissory note. In a bill of exchange there are, after acceptance, two people who offer security to the holder, the drawer and the acceptor; in a promissory note there is at first only the single security, that of the person who promises in the note to pay. The first case in which promissory notes were recognized by the Courts as negotiable instruments was the case of *Shelden v. Hentley*,<sup>7</sup> in 1680, where the Court held a promissory note to be a negotiable instrument, expressly

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<sup>4</sup> *Oaste v. Taylor*, 1 Cro. Jac. 306.

<sup>5</sup> *Sarsfield v. Witherby*, Carthew, 82.

<sup>6</sup> *Buller v. Cripps*, 6 Mod. 29.

<sup>7</sup> 2 Showers, p. 160.

saying that "it was the custom of merchants that made that good." That decision for some years afterwards was followed in other cases till Holt became Chief Justice. Lord Holt set his face against the custom of merchants and against promissory notes as negotiable instruments. In the case of *Clark v. Martin*<sup>8</sup> the reporter says: "But Holt, C. J., was with all his strength against this action, (on a promissory note), and said that this note could not be a bill of exchange; that the maintaining of these actions upon such notes were innovations upon the rules of Common Law, and that it amounted to setting up a new sort of specialty unknown to the Common Law, and invented in Lombard Street, which attempted in these matters of bills of exchange to give laws to Westminster Hall; that the continuing to declare upon these notes upon the custom of merchants proceeded from obstinacy and opinionativeness, since he had always expressed his opinion against them." It appears that Lombard street and the merchants therein thought that the "obstinacy and opinionativeness" was upon the side of Lord Holt, for they continued to use these documents and to sue upon them; and in the next year, in another case of *Buller v. Crispe*,<sup>9</sup> Lord Holt again expressed his opinion in strong terms, and said that these notes were not in the nature of bills of exchange, but were only an invention of the goldsmiths in Lombard Street, who had a mind to make a law to bind all that did deal with them. "At another day Holt, C. J., declared that he had desired to speak with two of the most famous merchants in London, to be informed of the mighty ill-consequences that it was pretended would ensue by obstructing this form, and they had told him that it was very frequent with them to make such notes, and that they looked upon them as bills of exchange, and that they had been used for a matter of thirty years; that not only notes but bonds for money were transferred frequently, and endorsed as bills of exchange," and the reporter winds up significantly, "the Court at last took the vacation to consider of it." Parliament stepped in and saved them from considering it any further, for by an act of the year 1704<sup>1</sup> it was expressly provided that promissory notes should be deemed as negotiable as bills of exchange. The preamble of the Act began: "Whereas it hath been held that promissory notes are not indorsable over, within the custom of merchants, therefore to encourage trade and commerce be it enacted." So in this case also the custom of merchants introduced an innovation into the law of Westminster Hall, although it needed the sanction of Parliament to induce Westminster Hall to recognize it.

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<sup>8</sup> (1702) 2 Lord Raymond, 758.

<sup>9</sup> 6 Modern Reports. p. 29.

<sup>1</sup> 3 & 4 Anne, c. 9.

The next step in the history was that bankers and goldsmiths who held money on deposit began to issue promissory notes payable on demand, that is to say they began to issue Bank Notes. To these again the custom of merchants very speedily gave negotiability, and in the leading case of *Miller v. Race*,<sup>2</sup> Lord Mansfield decided that bank notes also were negotiable instruments, holding that it was necessary for the purposes of commerce that their currency should be established and secured. And by the custom of merchants, bank notes have acquired a superior position to promissory notes. They are payable to any holder who may present them without the necessity of his indorsing them. There is a legend that the Bank of England always required persons presenting their bank notes to indorse them, and that on one occasion when the clerk of the bank behind the counter spoke in rather a cavalier manner to a gentleman who came in, telling him that he could not be paid unless he wrote his name on the back, the gentleman with the note walked out and promptly sued the Bank of England for dishonoring their promissory note, and of course sued them successfully, with the result of altering the custom at the Bank. Bank of England notes are now legal currency and tender, and in the case of country banks their notes may be, under certain circumstances, treated as currency and payment.

The next step was when the banks, besides issuing their promissory notes payable on demand, or bank notes, accepted and honored bills of exchange drawn on them by their customers, payable on demand; that is to say when the system of *Cheques* came into existence, for a cheque is a bill of exchange drawn on a bank by its customer, payable on demand.<sup>3</sup> To cheques, also, the practice of merchants has affixed certain incidents, as for instance the practice of crossing cheques, which originated partly in the usages of commerce and partly in the Clearing House; and has now been definitely recognized by Act of Parliament. Banks, by the custom of merchants, are also bound to honor cheques if they have funds of the customer in their hands; though a drawee, even though he had funds in his hand, would not be bound to accept a bill of exchange.

So far, the law of negotiable instruments, (bills of exchange, promissory notes, cheques, bank notes), has been codified by Parliament in the Bills of Exchange Act, 1882; "an Act to codify the law relating to bills of exchange, cheques, and promissory notes,"<sup>4</sup> and on all matter treated on by that Act the Law Merchant is now to be found in its clauses, and not in the cases and customs on which those clauses were founded.

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<sup>2</sup> 1 Smith's Leading Cases, 9th ed. p. 490.

<sup>3</sup> Bills of Exchange Act (1882), § 73.

<sup>4</sup> 45 & 46 Vic. c. 61.

## CHALMERS' DIGEST OF BILLS OF EXCHANGE, ETC.

[From the Introduction to the Third Edition.]

The results of this formation of the law by custom are instructive. A reference to Marius' treatise on Bills of Exchange, written about 1670, or Beawes' *Lex Mercatoria*, written about 1720, will show that the law, or perhaps rather the practice, as to bills of exchange, was even then pretty well defined. Comparing the usage of that time with the law as it now stands, it will be seen that it has been modified in some important respects. Comparing English law with French, it will be seen that, for the most part, where they differ, French law is in strict accordance with the rules laid down by Beawes. The fact is, that when Beawes wrote, the law or practice of both nations on this subject was uniform. The French law, however, was embodied in a Code by the "Ordonnance de 1673," which is amplified but substantially adopted by the Code de Commerce of 1818. Its development was thus arrested, and it remains in substance what it was 200 years ago. English law has been developed piecemeal by judicial decision founded on custom. The result has been to work out a theory of bills widely different from the original. The English theory may be called the Banking or Currency theory, as opposed to the French or Mercantile theory. A bill of exchange in its origin was an instrument by which a trade debt, due in one place, was transferred in another. It merely avoided the necessity of transmitting cash from place to place. This theory the French law steadily keeps in view. In England bills have developed into a perfectly flexible paper currency. In France a bill represents a trade transaction; in England it is merely an instrument of credit.<sup>5</sup> English law gives full play to the system of accommodation paper; French law endeavors to stamp it out.

A comparison of some of the main points of divergence between English and French law will show how the two theories are worked out. In England it is no longer necessary to express on a bill that value has been given, for the law raises a presumption to that effect. In France the nature of the value must be expressed, and a false statement of value avoids the bill in the hands of all parties with notice. In England a bill may now be drawn and payable in the same place (formerly it was otherwise, see the definition of bill in Comyns' Digest).<sup>6</sup> In France the place where a bill is drawn must

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<sup>5</sup> This passage was written in 1878, when the first edition was published. The theory it advances is independently confirmed by the excellent introduction to the Portuguese Commercial Code in the French edition, published by the *Comité de Législation Étrangère*. See p. xxix.

<sup>6</sup> "A bill of exchange is when a man takes money in one country or city upon exchange, and draws a bill whereby he directs another person in another country or city to pay so much to A. or order for value received of B., and subscribes it."

be so far distant from the place where it is payable, that there may be a possible rate of exchange between the two. A false statement of places, so as to evade this rule, avoids the bill in the hands of a holder with notice. As French lawyers put it, a bill of exchange necessarily presupposes a contract of exchange.<sup>7</sup> In England, since 1765, a bill may be drawn payable to bearer, though formerly it was otherwise.<sup>8</sup> In France it must be payable to order; if it were not so, it is clear that the rule requiring the consideration to be expressed would be an absurdity. In England a bill originally payable to order becomes payable to bearer when indorsed in blank. In France an indorsement in blank merely operates as a procuration. An indorsement, to operate as a negotiation, must be an indorsement to order, and must state the consideration; in short, it must conform to the conditions of an original draft. In England, if a bill be refused acceptance, a right of action at once accrues to the holder. This is a logical consequence of the currency theory. In France no cause of action arises unless the bill is again dishonored at maturity; the holder, in the meantime, is only entitled to demand security from the drawer and indorsers. In England a sharp distinction is drawn between current and overdue bills. In France no such distinction is drawn. In England no protest is required in the case of an inland bill, notice of dishonor alone being sufficient. In France every dishonored bill must be protested. Grave doubts may exist as to whether the English or the French system is the soundest and most beneficial to the mercantile community, but this is a problem which it is beyond the province of a lawyer to attempt to solve.

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(b) *Other negotiable paper.*

SCRUTTON, ELEMENTS OF MERCANTILE LAW. 1891.

[From Chapter II.]

There are, however, other negotiable instruments besides those which have been dealt with by the Act of 1882, and to such instruments the rules of the Common Law and the customs of the Law Merchant are still applicable. Fresh usages may be introduced, or new documents may be proved by the usage of merchants to have the two marks of negotiability already stated.<sup>9</sup> The usage that is proved must, however, be a usage of English merchants. In the case of *Picker v. The London and County Bank*,<sup>1</sup> an attempt was made to

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<sup>7</sup> This rule is said to be now obsolete; but the Code remains unaltered.

<sup>8</sup> See *Stewart v. Hodges* (1692), 12 Mod. 36.

<sup>9</sup> *Ante*, p. 26. [Herein pp. 25-26. — H.]

<sup>1</sup> 18 Q. B. D. p. 515.

treat certain Prussian bonds as negotiable instruments in England; but the only evidence that was offered was that those bonds were negotiable by the custom of Prussian merchants, and the Court unanimously rejected the evidence as insufficient. As it was pointedly put, the fact that in Africa cowries are negotiable instruments does not therefore bind the English Courts to accept cowries as negotiable instruments in England, and the same principle has always been applied in any attempt to prove the negotiability of instruments in England; the usage proved must be a usage of English merchants. It is not necessary that that usage should be from time immemorial, Mr. Justice Blackburn did, indeed, in one case<sup>2</sup> lay down that such a usage, existing as part of the ancient Law Merchant was necessary; but in the later case, *Goodwin v. Roberts*,<sup>3</sup> both the Court of Appeal and the House of Lords held that to be too narrow a limitation, deciding that the Law Merchant might be added to by proof of recent usage, and thus that new negotiable instruments might be from time to time created. We find in the Reports a series of illustrations of these principles of law in the various documents that have been from time to time proved or not proved to be negotiable instruments. For instance, in the case of *Glynn v. Baker*,<sup>4</sup> East India bonds were held not to be negotiable in the absence of any evidence that they customarily passed by delivery; but the decision in the Courts was immediately remedied by Parliament, who passed an Act giving to East India bonds the character of negotiability.<sup>5</sup> In *Dixon v. Bovill*,<sup>6</sup> a document called an "iron warrant," running "I will deliver one hundred tons of iron when required after Sept. 18th to the party lodging this document with me," was held by the House of Lords not to be a negotiable instrument, and not therefore to pass by delivery, there being no evidence before the Court of any mercantile usage affecting such documents; it is, however, very probable that if the question of iron warrants came before the Court at the present day, they could be abundantly proved to be negotiable.

To come to more recent cases, in *The Fine Arts Society v. The Union Bank*,<sup>7</sup> it was held that Post Office orders crossed for collection by a bank were not negotiable instruments; and in *Crouch v. The Credit Foncier*,<sup>8</sup> debenture bonds of an English company were held not negotiable because the only proof of usage tendered was

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<sup>2</sup> *Crouch v. Credit Foncier*, L. R. 8 Q. B. 374, followed on this by *Manisty, J.*, in 20 Q. B. D. at p. 239.

<sup>3</sup> L. R. 10 Ex. at p. 355; 1 App. C. at p. 494.

<sup>4</sup> 13 East, 509.

<sup>5</sup> 51 Geo. III. c. 64.

<sup>6</sup> 3 Macqueen's Reports, p. 1.

<sup>7</sup> 17 Q. B. D. 705.

<sup>8</sup> L. R. 8 Q. B. D. 374.

one originating in the last twenty years. On the other hand, in *Gorgier v. Mievill*,<sup>9</sup> certain foreign bonds were held to be negotiable instruments on proof that bonds of that description were sold in the English market, and passed from hand to hand daily like Exchequer bills. And that case was followed in *Goodwin v. Roberts*,<sup>1</sup> in which certain scrip, which on the payment of all instalments due was to be exchanged for bonds, was held a negotiable instrument on proof of usage of the English Stock Exchange.<sup>2</sup> There is one other case I wish to mention to you as an illustration of the Common Law maxim I have already reminded you of, that a man cannot give what he has not got, and therefore if he has not got a title cannot give it. The recent case of *Barton v. The London and North Western Railway*<sup>3</sup> is at the present time exciting very great apprehension in commercial circles. Mr. Barton held certain shares in the L. & N. W. Railway which passed to his executors, and one of the executors by forging the signature of the other executor sold those shares some twelve or thirteen years ago. The purchaser took the transfer with the forged signature to the L. & N. W. Railway Company, who registered it, and for the twelve or thirteen years the purchaser has been registered for those shares and has received the dividends. The executrix whose signature was forged — for a lady was concerned — did not find out the absence of these shares for the thirteen years, but on finding it out and on proof of the forgery, the L. & N. W. Company were ordered to replace her name on the register, and the unfortunate purchasers have had to give up their shares, and to pay back the dividends which they have received during the thirteen years. A man cannot give what he has not got.

The people who purported to pass these shares had not got them to give. At present agitation, if one may use such a word, is taking place on every English Stock Exchange for an Act which will protect the people whose transfers have been registered by Railway Companies against the rules of the Common Law.\*

<sup>9</sup> 3 B. & C. 45.

<sup>1</sup> L. R. 10 Ex.

<sup>2</sup> For recent cases in which the question of negotiability was raised see *Lord Sheffield v. London Joint Stock Bank*, L. R. 13 App. C. 333, and *Colonial Bank v. Williams*, 15 App. C. p. 267.

<sup>3</sup> L. R. 24 Q. B. D. 77.

<sup>4</sup> See also on the subject of negotiable instruments, other than bills, notes and checks, Chalmers' Bills of Exchange Act (5th ed.), pp. 312-327; 2 Ames' Cases on Bills and Notes, pp. 748-784; 2 Daniel on Neg. Inst., pp. 496-595, 730-785. —H.



## ARTICLE II.

### FORM AND INTERPRETATION.

#### (i) *Form Required.*

#### I. Writing and signature.

##### § 20

##### GEARY v. PHYSIC.

5 BARNEWALL & CRESWELL (K. B.) 234. — 1826.

ASSUMPSIT by the plaintiff as indorsee against the defendant as maker of a promissory note for the sum of 30*l.* payable two months after date to the order of one Folder, and indorsed by him, Folder, to one Kemp, who subsequently indorsed the note to the plaintiff. At the trial before Abbott, C. J., at the London sittings after Hilary term, 1825, it appeared that the indorsement by Kemp to the plaintiff was in pencil, and it was thereupon objected that the plaintiff could not recover; an indorsement *in pencil* not being such an indorsement as the law and custom of merchants recognizes to be sufficient to pass the interest in a bill of exchange, and promissory notes being by the statute 3 and 4 Ann, c. 9, § 1, assignable or indorsable in the same manner as unpaid bills of exchange are according to the custom of merchants. The Lord Chief Justice thought it sufficient, and directed the jury to find a verdict for the plaintiff, reserving liberty to the defendant's counsel to move to enter a nonsuit, if the court should be of opinion that the indorsement of the promissory note in pencil was not a good and valid indorsement.

ABBOTT, C. J. — There is no authority for saying that where the law requires a contract to be in writing, that writing must be in ink. The passage cited from Lord Coke shows that a deed must be written on paper or parchment, but it does not show that it must be written in ink. That being so, I am of opinion that an indorsement on a bill of exchange may be by writing in pencil. There is not any great danger that our decision will induce individuals to adopt such a mode of writing in preference to that in general use. The imperfection of this mode of writing, its being so subject to obliteration, and the impossibility of proving it when it is obliterated, will prevent it being generally adopted. There being no authority to show that a contract which the law requires to be in writing should be written in any particular mode, or with any specific material, and the law of merchants requiring only that an indorsement of bills of exchange should be in writing,<sup>5</sup> without specifying the manner with

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<sup>5</sup> See custom stated in *Lutwyche*, 878.

which the writing is to be made, I am of opinion that the indorsement in this case was a sufficient indorsement in writing within the meaning of the law of merchants, and that the property in the bill, passed by it to the plaintiff.

BAYLEY, J. — I think that a writing in pencil is a writing within the meaning of that term at common law, and that it is a writing within the custom of merchants. I cannot see any reason why, when the law requires a contract to be in writing, that contract shall be void if it be written in pencil. If the character of the handwriting were thereby wholly destroyed, so as to be incapable of proof, there might be something in the objection; but it is not thereby destroyed, for, when the writing is in pencil, proof of the character of the handwriting may still be given. I think, therefore, that this is a valid writing at common law, and also that it is an indorsement according to the usage and custom of merchants; for that usage only requires that the indorsement should be in writing, and not that that writing should be made with any specific materials.

Holroyd, J., concurred.

Rule discharged.\*

## § 20

## REG. v. HARPER.

L. R. 7 QUEEN'S BENCH DIVISION, 78. — 1881.

[Court for Crown Cases Reserved.]

INDICTMENT for forging an indorsement to a bill of exchange. John Watson & Son drew a bill on Harper, but did not sign it. Harper accepted it, forged the indorsement of John Hunt, and returned it.

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\* Accord: *Brown v. Butchers, etc., Bank*, 6 Hill (N. Y.) 443, *post*, p. 37; *Closson v. Stearns*, 4 Vt. 11; *Reed v. Roark*, 14 Tex. 329. Where an acceptance of a bill is required by statute to be in writing (Neg. Inst. L., § 220), a telegraphic acceptance satisfies the statute. *Garrettson v. North Atchison Bank*, 39 Fed. Rep. 163; 47 Fed. Rep. 867; 51 Fed. Rep. 168.

A negotiable instrument may be drawn in any language. *Re Marseilles Co.*, L. R. 30 Ch. D. 598. — H.

[Signature to a check by a bank depositor by her mark in lead pencil is valid. "Citation of authority is not necessary to show that it is immaterial with what kind of an instrument a signature is made." LADD, J., in *Drefahl v. Security Sav. Bk.*, 132 Iowa 563, 573.

It was held in *Flanders v. Snare*, 37 Pa. Super. Ct. 28, that there is nothing in the Negotiable Instruments Law to prevent the use of a rubber stamp in the indorsement of negotiable paper. "Of course, we are not to be understood as saying that an indorsement made by the use of a rubber stamp, any more than one made in manuscript, proves itself. In either case the maker or acceptor, when called upon to pay by one claiming to be the lawful holder by virtue of such indorsement, may demand proper proof of the genuineness and authenticity of the indorsement." HEAD, J., p. 31. — C.]

Watson and Son indorsed it and placed it in bank for collection. They did not at any time sign it as drawers. The following is a copy of the bill:

£22 10s. 4d.

KILMARNOCK, 2 Nov. 1880.

One month after date pay to me or order the sum of £22 10s. 4d., that being for value received in machinery.

To Mr. J. HARPER, ETC.

[Across the face]: Accepted payable at the Union Bank of London. JOHN HARPER.

[Indorsed]: JOHN HUNT. JOHN WATSON & SON.

Harper was convicted and sentenced, but execution of the sentence was suspended till the decision of the case by the Court for Crown Cases Reserved.

LORD COLERIDGE, C. J. — The conviction cannot be sustained. The instrument was not a bill of exchange; it was an inchoate bill of exchange. The point requires no authority, though it has the authority of the cases of *McCall v. Taylor* (34 L. J. C. P. 365); *Stoessiger v. South Eastern Ry. Co.* (3 E. & B. 549); *Peto v. Reynolds* (23 L. J. Ex. 98; 9 Ex. 410; 11 Ex. 418); and *Rex v. Pateman* (Russ & Ry. 455).

STEPHEN, J. — Though I entirely agree with the opinion expressed by my Lord, I cannot help observing that the act of the prisoner has all the effect of a forgery punishable under the statute as a felony; the prisoner could, however, have been indicted, and ought to have been indicted, for forgery at common law.

GROVE, HAWKINS and LOPES, JJ., concurred.

Conviction quashed.<sup>7</sup>

## § 20

## TAYLOR v. DOBBINS.

1 STRANGE (K. B.) 399. — 1720.

In case upon a promissory note the declaration ran, that the defendant made a note, *et manu sua propria scripsit*. Exception was taken, that since the statute he should have said that the defendant signed the note, but the Court held it well enough, because laid to be wrote with his own hand, and there needs no subscription in that case, for it is sufficient his name is in any part of it. *I. J. S. promise to pay*, is as good as *I promise to pay*, subscribed *J. S.*<sup>8</sup>

<sup>7</sup> Accord: *Tevis v. Young*, 1 Mete. (Ky.) 197; *Heman v. Francisco*, 12 Mo. App. 560. — H.

<sup>8</sup> *Vide Eliot v. Cowper*, 1 Strange, 609. [Accord: *Quin v. Sterne*, 26 Ga. 223. The courts make a clear distinction between the statutory requirement that an instrument shall be "signed" and the requirement that it shall be "subscribed." — *James v. Patten*, 6 N. Y. 9. — H.]

## § 20

BROWN *v.* BUTCHERS & DROVERS' BANK.

6 HILL (N. Y.) 443. — 184.

On error from the Superior Court of the city of New York, where the Butchers and Drovers' Bank sued Brown as the indorser of a bill of exchange, and recovered judgment. The indorsement was made with a lead pencil, and in figures, thus, "1. 2. 8." no name being written. Evidence was given strongly tending to show that the figures were in Brown's handwriting, and that he meant they should bind him as indorser; though it also appeared he could write. The court below charged the jury that, if they believed the figures upon the bill were made by Brown, as a substitute for his proper name, intending thereby to bind himself as indorser, he was liable. Exception. The jury found a verdict for the plaintiffs below, on which judgment was rendered, and Brown thereupon brought error.

*By the Court*, NELSON, Ch. J. — It has been expressly decided that an indorsement written in pencil is sufficient; (*Gearry v. Physic*, 5 Barn. & Cress. 234); and also that it may be made by a mark. (*George v. Surrey*, 1 Mood. & Malk. 516). In a recent case in the K. B. it was held that a mark was a good signing within the statute of frauds; and the court refused to allow an inquiry into the fact whether the party could write, saying that would make no difference. (*Baker v. Dening*, 8 Adol. & Ellis, 94; and see *Harrison v. Harrison*, 8 Ves. 186; *Addy v. Grix*, id. 504.)

These cases fully sustain the ruling of the court below. They show, I think, that a person may become bound by any mark or designation he thinks proper to adopt, provided it be used as a substitute for his name, and he intend to bind himself.<sup>9</sup>

Judgment affirmed.

## II. Unconditional promise or order to pay a sum certain in money.

## 1. A NOTE MUST CONTAIN A PROMISE.

## § 20

GAY *v.* ROOKE.

151 MASSACHUSETTS, 115. — 1890.

Contract on the following instrument, declared on as a promissory note:

MARLBORO', SEPT. 23, 1881.  
dolls. 5-100 for value received.

I. O. U., E. A. Gay, the sum of seventeen  
JOHN R. ROOKE.

Writ dated September 19, 1887. At the trial in the Superior Court, without a jury, before Dewey, J., the only issue was whether the

<sup>9</sup> See *Rogers v. Coit*, 6 Hill, 322, 3.

plaintiff was entitled to interest from the date of the instrument, or from that of the writ, the service of which was the only demand made by the plaintiff.

The plaintiff asked the judge to rule, as a matter of law, that he was entitled to interest from the date of the instrument. The judge declined so to rule, and ruled that interest could be recovered from the date of the writ only, and found for the plaintiff for \$17.05 only; and the plaintiff alleged exceptions.

DEVENS, J. — In order to constitute a good promissory note there should be an express promise on the face of the instrument to pay the money. A mere promise implied by law, founded on an acknowledged indebtedness, will not be sufficient. (*Story*, Prom. Notes, § 14; *Brown v. Gilman*, 13 Mass. 158.) While such promise need not be expressed in any particular form of words, the language used must be such that the written undertaking to pay may fairly be deduced therefrom. (*Commonwealth Ins. Co. v. Whitney*, 1 Met. 21.) In this view the instrument sued on cannot be considered a promissory note. It is an acknowledgment of a debt only, and, although from such an acknowledgment a promise to pay may be legally implied, it is an implication from the existence of the debt, and not from any promissory language. Something more than this is necessary to establish a written promise to pay money. It was therefore held in *Gray v. Bowden* (23 Pick. 282), that a memorandum on the back of a promissory note, in these words, "I acknowledge the within note to be just and due," signed by the maker and attested by a witness, was not a promissory note signed in the presence of an attesting witness within the meaning of the statute of limitations. In England an I. O. U., there being no promise to pay embraced therein, is treated as a due bill only. The cases, which arose principally under the Stamp Act, are very numerous, and they have held that such a paper did not require a stamp, as it was only evidence of a debt. (1 *Danl. Neg. Inst.* 3d ed. § 36; 1 *Randolph Com. Paper*, § 88; *Fesenmayer v. Adcock*, 16 M. & W. 449; *Melanotte v. Teasdale*, 13 M. & W. 216; *Smith v. Smith*, 1 F. & F. 539; *Gould v. Coombs*, 1 C. B. 543; *Fisher v. Leslie*, 1 Esp. 425; *Israel v. Israel*, 1 Camp. 499; *Childers v. Boulnois*, Dowl. & Ry. N. P. 8; *Beeching v. Westbrook*, 8 M. & W. 411.)

While in a few States it has been held otherwise, the law as generally understood in this country is, that, in the absence of any statute, a mere acknowledgment of a debt is not a promissory note, and such is, we think, the law of this Commonwealth. (*Gray v. Bowden*, 23 Pick. 282; *Commonwealth Ins. Co. v. Whitney*, 1 Met. 21; *Daggett v. Daggett*, 124 Mass. 149; *Almy v. Winslow*, 126 Mass. 342; *Carson v. Lucas*, 13 B. Mon. (Ky.) 213; *Garland v. Scott*, 15 La. Ann. 143; *Currier v. Lockwood*, 40 Conn. 349; *Brenzer v. Wight-*

man, 7 Watts & Serg. 264; *Biskup v. Oberle*, 6 Mo. App. 583.) Some States have by statute extended the law of bills and promissory notes to all instruments in writing whereby any person acknowledges any sum of money to be due to any other person. (1 *Randolph*, Com. Paper, § 88; *Rev. Sts. Ill.* 1884, c. 98, § 3; *Gen Sts. Col.* 1883, c. 9, § 3; *Rev. Sts. Ind.* 1881, § 5501; *Code, Iowa*, 1873, § 2085; *Rev. Code Miss.* 1880, §§ 1123, 1124.)

We have no occasion to comment upon those instruments in which words have been used or superadded from which an intention to accompany the acknowledgment with a promise to pay has been gathered, or where the form of the instrument fairly led to that conclusion. (*Daggett v. Daggett*, 124 Mass. 149; *Almy v. Winslow*, 126 Mass. 342.) No such words exist in the instrument sued, nor is it in form anything but an acknowledgment. The words "for value received" recite indeed the consideration, but they add nothing which can be interpreted as a promise to pay. It is therefore unnecessary to consider whether if the paper were a promissory note, interest should be calculated from its date. Upon this point we express no opinion.<sup>1</sup> If it is to be treated as an acknowledgment of debt only, as we think it must be, the plaintiff is not entitled to interest except from the date of the writ. Even if it was the duty of the defendant to have paid the debt on demand, yet if no demand was made, if no time was stipulated for its payment, if there was no contract or usage requiring the payment of interest, and if the defendant was not a wrongdoer in acquiring or detaining the money, interest should be computed only from the demand made by the service of the writ. (*Dodge v. Perkins*, 9 Pick. 368; *Hunt v. Nevers*, 15 Pick. 500.) "In general," says Chief Justice Shaw, "when there is a loan without any stipulation to pay interest, and where one has the money of another, having been guilty of no wrong in obtaining it, and no fault in retaining it, interest is not chargeable." (*Hubbard v. Charlestown Railroad*, 11 Met 124; *Calton v. Bragg*, 15 East., 222; *Shaw v. Picton*, 4 B. & C. 715; *Moses v. Macferlan*, 2 Burr. 1005; *Walker v. Constable*, 1 Bos. & P. 306.)

Exceptions overruled.

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<sup>1</sup> It seems that in the case of a negotiable instrument payable on demand, no interest being reserved, interest will run only from the date of demand. *Scovil v. Scovil*, 45 Barb. (N. Y.) 517; *Herrick v. Woolverton*, 41 N. Y. 581; *Ziel v. Dukes*, 12 Calif. 479. But bringing an action constitutes demand. *Pierce v. Fothergill*, 2 Bing. N. C. 167; *Bank v. Davidson*, 70 N. Car. 118. See § 130, *post*, and cases. — H.

## § 20

## SMITH v. ALLEN.

5 DAY (CONN.) 337. — 1812.

SMITH, J. — This was a writ of error, brought by the defendants in the court below, to reverse a judgment rendered against them in that court.

The declaration was in common form, in *assumpsit*, counting upon a promissory note, and demanding \$100 damages. To this, there was a demurrer and joinder in demurrer. The writing counted upon, and recited in the declaration, was of the following tenor, viz.

Due John Allen ninety-four dollars, 91 cents, on demand.

JOSEPH L. SMITH,  
SETH P. BEERS.

LITCHFIELD, August 30, 1808.

The court below adjudged the declaration to be sufficient and rendered judgment for the plaintiff, to recover 111 dollars, 99 cents, damages. \* \* \*

On this subject, in my view, it is very clear, that where a writing contains nothing more than a bare acknowledgment of a debt, it does not, in legal construction, import an express promise to pay. It would not appear, from such a writing, that the parties intended the debt should be paid. Their meaning might be, in such case, merely to settle their accounts, in writing, with a view to further dealings.

But where a writing imports not only the acknowledgment of a debt, but an agreement to pay it, this amounts to an express contract.

From the writing in question, it is perfectly manifest that the debt acknowledged to be due was to be paid on demand, as fully, as if the words "to be paid" or "which we promise to pay," had been inserted next before the words "on demand."

I think, therefore, that the declaration is sufficient; and that the cause ought to be remanded for further proceedings.

The other judges severally concurred in this opinion.

Judgment reversed, and the cause remanded.<sup>2</sup>

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<sup>2</sup> "Due A. B. \$325 payable on demand," *Kimball v. Huntington*, 10 Wend. (N. Y.) 675; "I. O. U. £20 to be paid on the 22d instant," *Brooks v. Elkins*, 2 Meeson & Welsby, 74, *accord*. "Borrowed this day of A. B. £100 for one or two months; check, £100, on the Naval Bank," *Hyne v. Dewdney*, 21 Law Journal, Q. B. 278, *contra*. If the due bill have words of negotiation as "or order" or "or bearer," it is generally held to be a promissory note. *Russell v. Whipple*, 2 Cow. (N. Y.) 536; *Sackett v. Spencer*, 29 Barb. (N. Y.) 180. — H.

§ 20 *HEGEMAN v. MOON*, 131 New York, 462. — 1892. “One year after my death I hereby direct my executors to pay to A. B., etc., being the balance due him for cash advanced, etc.” *PECKHAM, J.* — “The acknowledgment of the indebtedness, and that it is due, implies a promise to pay it on demand. It is a promissory note within the statute. \* \* \* The direction is, however, in the nature of a promise and expresses a time of payment, and, therefore, excludes the presumption that it is payable immediately, which would otherwise arise from the use of the word *due*.”

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§ 20 *SCHMITZ v. HAWKEYE GOLD MINING CO.*, 8 S. Dak. 544, 67 N. W. R. 618. — 1896. “Time Check, No. 189. \$98.65. General Managers’ Office, Hawkeye Gold Mining Company. Pluma, So. Dak., June 10th, 1893. Due W. C. Robinson the sum of ninety-eight dollars and sixty-five cents (\$98.65), payable at this office, on the 20th day of June, 1893, to him or order. David Hunter, General Manager, by L. A. Fell. W. C. Robinson.” [Indorsed] “W. C. Robinson.” *FULLER, J.* — “As the writing before us is negotiable in form, and the signer, in legal effect, promises to pay a specified sum of money, we conclude that the instrument is a promissory note, and that appellant’s [Robinson’s] liability was only that of an indorser. The words ‘payable to W. C. Robinson or order,’ unconditionally, at a specified time and place, a certain amount of money, import a promise; and the instrument contains every essential element of a promissory note. \* \* \* There was no allegation in the complaint nor proof at the trial by which to charge appellant, as an indorser or otherwise.”

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§ 20 *HUSSEY v. WINSLOW*, 59 Maine, 170. — 1870. “Nobleboro, Oct. 4, 1869. Nathaniel O. Winslow, *Cr.* By labor 16¾ days @ \$4 per day, \$67.00. Good to bearer. William Vannah.” *DANFORTH, J.* — “It would seem that the only possible construction which can be given to this instrument is, substantially, this: In consideration of 16¾ days’ labor, performed by Nathaniel O. Winslow, at \$4 per day, amounting to \$67.00, I promise to pay him, or bearer, that sum on demand. Signed, William Vannah. Here we have every element of a negotiable promissory note; a maker, a payee, a promise or engagement to pay a certain sum of money at a specified time, absolutely and unconditionally, and the word bearer to make it negotiable.”



## § 20

## CURRIER v. LOCKWOOD.

40 CONNECTICUT, 349. — 1873.

Assumpsit upon a written instrument, which the plaintiffs claimed was a promissory note, non-negotiable, and was not barred until seventeen years from its date. The trial court held it not a promissory note and that it was barred by the statute of limitations.

SEYMOUR, C. J. — The first question in this case is whether the writing sued upon is a promissory note within the meaning of those words in the statute of limitations. The statute is as follows: "No action shall be brought on any bond or writing obligatory, contract under seal, or promissory note not negotiable, but within seventeen years next after an action shall accrue." The instrument sued upon is as follows:

BRIDGEPORT, Jan. 22nd, 1863, \$17.14. Due Currier and Barker seventeen dollars and fourteen cents, value received. FREDERICK LOCKWOOD.

Promissory notes not negotiable are by the statute above recited put upon the footing of specialties in regard to the period of limitation, and for most other purposes such notes have been regarded as specialties in Connecticut. The instrument, however, to which this distinction has been attached is the simple express promise to pay money in the stereotyped form familiar to all. The writing given in evidence in this case is a due bill and nothing more. Such acknowledgments of debt are common and pass under the name of due bills. They are informal memoranda, sometimes here as in England in the form "I. O. U." They are not the promissory notes which are classed with specialties in the statute of limitations. The law implies indeed a promise to pay from such acknowledgments, but the promise is simply implied and not express. It is well said by Smith, J., in *Smith v. Allen* (5 Day, 337), "Where a writing contains nothing more than a bare acknowledgment of a debt, it does not in legal construction import an express promise to pay; but where a writing imports not only the acknowledgment of a debt but an agreement to pay it, this amounts to an express contract."

In that case the words "on demand" were held to import and to be an express promise to pay. That case adopts the correct principle, namely, that to constitute a promissory note there must be an express as contra-distinguished from an implied promise. The words "on demand" are here wanting. The words "value received," which are in the writing signed by the defendant, cannot be regarded as equivalent to the words "on demand." The case of *Smith v. Allen* went to the extreme limit in holding the writing there given to be a promissory note, and we do not feel at liberty to go further in that direction than the court then went.

The writing then not being a promissory note, the plaintiff's action is barred by the six years' clause of the statute, unless revived by a new promise to pay.

A new trial is not advised.<sup>3</sup>

PARK and CARPENTER, JJ., concur. FOSTER and PHELPS, JJ., dissent.

## § 20

## MILLER v. AUSTIN.

13 HOWARD (U. S.) 218. — 1851.

ACTION by indorsee against indorser, alleging due presentment, demand, notice and protest. Judgment for plaintiff. Defendant brings writ of error.

MR. JUSTICE CATRON delivered the opinion of the court.

The only question this case presents that we deem worthy of notice is, whether the paper sued on is a negotiable instrument; it is as follows:

No. 959. MISSISSIPPI UNION BANK,

JACKSON, (Miss.) Feb. 8, 1840. I hereby certify, that Hugh Short has deposited in this bank, payable twelve months from 1st May, 1839, with 5 per cent. interest till due, fifteen hundred dollars, for the use of Henry Miller, and payable only to his order upon the return of this certificate, \$1,500.

WILLIAM P. GRAYSON, *Cashier*.

The suit was by the last indorsee against his immediate indorser, and brought in Ohio. The statute of that State declares all promissory notes, drawn for a certain sum, payable to any person or order, or to any person or his assigns, negotiable by indorsement.

The established doctrine is, that a promise to deliver, or to be accountable for, so much money, is a good bill or note. Here the sum is certain, and the promise direct. Every reason exists why the indorser of this paper should be held responsible to his indorsee, that can prevail in cases where the paper indorsed is in the ordinary form of a promissory note; and as such note, the State courts generally, have treated certificates of deposit payable to order; and the principles adopted by the State courts in coming to this conclusion, are fully sustained by the writers of treatises on bills and notes. Being of opinion that the Circuit Court properly held the paper indorsed, negotiable, it is ordered that the judgment be affirmed.<sup>4</sup>

<sup>3</sup> Contra: *Jacquin v. Warren*, 40 Ill. 459; *Brady v. Chandler*, 31 Mo. 28. For criticism of *Currier v. Lockwood*, see 14 Am. L. Reg. N. S. 20. — H.

<sup>4</sup> Accord: *Pardee v. Fish*, 60 N. Y. 265; *Frank v. Wessels*, 64 N. Y. 155; *Beardsley v. Webber*, 104 Mich. 88; *Kirkwood v. First Nat. Bk.*, 40 Neb. 484; *Klauber v. Biggerstaff*, 47 Wis. 551. The certificate of deposit is to be dis-

## 2. A BILL MUST CONTAIN AN ORDER.

§ 20

HOYT v. LYNCH.

2 SANDFORD'S SUPERIOR COURT REP. (N. Y.) 328. — 1849.

ASSUMPSIT on an order drawn upon the defendant, with the common counts. At the trial, it appeared that Smith and Woglom, builders, erected certain buildings for the defendant in Williamsburgh, in 1847. The plaintiff claimed to have tinned the roofs and put up the gutters for those buildings, and his bill for the work, rendered to S. & W., amounted to \$300.88. They gave an order on the defendant, written at the foot of the bill, as hereafter set forth. The order was presented by one Harris to the defendant, who said he could not pay it until he went and saw how the buildings progressed. The plaintiff then proved by Harris, that two or three days afterwards the defendant met the latter at the buildings, and there promised to pay the order as soon as the sashes were put in, and those were put in early in January, 1848.

The bill and order were read in evidence in these words, viz:—

NEW YORK, 16th Dec., 1847.

Messrs. SMITH AND WOGLOM,

To C. H. HOYT, Dr.

To tin roof, 86 ft. x 37½ ft. 3225 ft. @ 7½c.....	\$241.87
112 of 3 in. leader.....	11.20
85 ft. of copper gutter, 4s 6d.....	47.81
	<hr/>
	\$300.88
	<hr/>

WILLIAMSBURGH, Dec. 16, 1847.

MR. J. LYNCH

Please pay the above bill, being the amount for tinning your houses on South Sixth street, and charge the same to our account,

And much oblige yours,

SMITH & WOGLOM.

tinguished from the "deposit slip," which is merely a receipt or memorandum, containing no promise, and requiring no return. *First Nat. Bk. v. Clark*, 134 N. Y. 368, 372.

For orders on savings banks, see *White v. Cushing*, 88 Me. 339, *post*, p. 46. — H.

["Doubtless a certificate of deposit may be issued in the form of a negotiable instrument. (*Frank v. Wessels*, 64 N. Y. 155.) But from our examination of the subject there seems to be no uniform usage in commercial circles or with monetary institutions as to their forms. Some are plainly negotiable, some equally plainly are not negotiable, while between the two extremes are many of the debatable class." CULLEN, C. J., in *Zander v. N. Y. Security & Trust Co.*, 178 N. Y. 208, 210.

For certificates of deposit held to be negotiable under the Negotiable Instruments Law, see *Forrest v. Safety Banking & Trust Co.*, 174 Fed. 345; *Kavanagh v. Bank of America*, 239 Ill. 404; *Dickey v. Adler*, 127 Southwestern (Kansas City Ct. App., Mo.) 593. — C.]

*By the Court.* OAKLEY, CH. J. — [After disposing of another matter.] There was another question argued, which must arise on a new trial, and it is right that we should express our views upon it at this time. It is said that the order upon which the suit is founded, is a bill of exchange, and that there is no written acceptance of the same.

On consideration, we have come to the conclusion that this is a bill of exchange. It is an order in writing, drawn by one party on another, requesting the latter to pay a certain sum of money to a third party, at all events; depending upon no contingency, and payable out of no particular fund. It comes within the reason of the statute requiring a written acceptance to charge the drawee. It is true this order is not negotiable, but that is not necessary to make it a bill of exchange.<sup>5</sup>

New trial granted.

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§ 20 THE KING *v.* ELLOR, 1 Leach, Crown Law, 323. — 1784. “Messrs. Songer, — Please to send £10 by the bearer, as I am so ill I cannot wait on you. Elizabeth Wery.” Ellor was indicted for forging a bill of exchange. THE COURT. — “This appears to be a mere letter, rather requesting the loan of money than ordering the payment of it. The terms of it do not import anything compulsory on the part of the drawee to pay it.”

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§ 20 RUFF *v.* WEBB, 1 Espinasse, 129. — 1794. “Mr. Nelson will much oblige Mr. Webb by paying J. Ruff, or order, twenty guineas on his account.” LORD KENYON said, that he was of opinion, that the paper offered in evidence was a bill of exchange; that it was an order by one person to another, to pay money to the plaintiff or his order, which was in point of form a bill of exchange.”

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§ 20 LITTLE *v.* SLACKFORD, Moody & Malkin, 171. — 1828. “Mr. Little: — Please to let the bearer have seven pounds, and place to my account, and you will oblige, your humble servant, R. Slackford.” — LORD TENTERDEN, C. J. — “The paper does not purport to be a demand made by a party having a right to call on the other to pay. The fair meaning is, ‘you will oblige me by doing it.’”<sup>6</sup>

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<sup>5</sup> See *Mehlberg v. Tisher*, 24 Wis. 607, *post.* — H.

<sup>6</sup> “Thomas Williams, Esq. — Please let the bearer have \$50. I will arrange it with you this noon. Yours, most obedient, S. R. Biesenthall,” was held to be a bill of exchange. *Biesenthall v. Williams*, 1 Duvall (Ky.) 329, 1864.

## 3. THE PROMISE OR ORDER MUST BE UNCONDITIONAL.

(a) *Conditional promises or orders are not negotiable.*<sup>7</sup>

## § 20

## WHITE v. CUSHING.

88 MAINE, 339. — 1896.

ASSUMPSIT on an order. The trial court ruled that the order was negotiable and the action could be maintained in the name of White by a simple indorsement by Lawler. Defendant excepted.

FOSTER, J. — The plaintiff sues as indorsee of an order signed by the defendant of the following tenor:

\$120.

DOVER, Oct. 27, 1893.

PISCATAQUIS SAVINGS BANK.

Pay James Lawler, or order, one hundred and twenty dollars, and charge to my account on book No. —

J. N. CUSHING.

Witness ———

The bank book of the depositor must accompany this order.

The order was indorsed in blank on the back by James Lawler and Samuel Lewis, and the plaintiff claimed to recover against the defendant as upon a negotiable instrument. The real question presented is whether the instrument declared on is negotiable, so that an action may be maintained upon it in the name of the indorsee.

To constitute a negotiable draft or order, it must be a written order from one party to another for the payment of a certain sum of money, and that absolutely, and without any contingency that would embarrass its circulation, to a third party or his order or bearer.

It has often been held that a bill or note is not negotiable if made payable out of a particular fund. But there is a distinction between such instruments made payable out of a particular fund, and those that are simply chargeable to a particular account. In the latter case, the payment is not made to depend upon the adequacy of that fund, the only purpose being to inform the drawee as to his means of reimbursement, and the negotiability of the instrument is not affected by it.

The objection that is raised to the negotiability of this instrument is, not that it is made payable out of a particular fund, but that it is subject to such a contingency as necessarily embarrasses its circula-

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Words of civility do not prevent the instrument from being an order. *Wheatley v. Strobe*, 12 Cal. 92.

By the law merchant a bill of exchange need not be payable to order or bearer, or have the words value received, or be payable at a day certain or at any particular place. Thus: "To Hoxie & Rich: Please pay to Chas. Mehlberg the sum of \$69.20, and charge to me. Chas. Tisher," is a bill of exchange by the law merchant. *Mehlberg v. Tisher*, 24 Wis. 607, *post*. See § 25, *post*. — H.

<sup>7</sup> See note in 125 Am. St. Rep. at p. 192. — C.

tion and imposes a restraint upon its negotiability, by means of these words contained upon the face of the order: "The bank book of the depositor must accompany this order." Although these words are upon the face of the order below the signature of the drawer, they were there at the time of its inception, became a substantive part of it and qualified its terms as if they had been inserted in the body of the instrument. (*Littlefield v. Coombs*, 71 Maine, 110; *Cushing v. Field*, 70 Maine, 50, 54; *Johnson v. Heagan*, 23 Maine, 329; *Barnard v. Cushing*, 4 Metcalf, 230; *Heywood v. Perrin*, 10 Pick. 228; *Benedict v. Cowden*, 49 N. Y. 396; *Costelo v. Crowell*, 127 Mass. 293, and cases there cited.)

Was the order negotiable? The answer to that depends upon the effect of the words "The bank book of the depositor must accompany this order." If not negotiable, the plaintiff as indorsee cannot maintain an action upon it. (*Noyes v. Gilman*, 65 Maine, 589.) If their effect is such as constitutes a contingency in relation to the payment of the order, dependent upon the production of the drawer's bank book by the holder or indorsee of the order, then they must be regarded as such an embarrassment to the negotiation of the order, and such restriction upon its circulation for commercial purposes as to render it non-negotiable.

Without these words the order is payable absolutely, and there is no apparent uncertainty affecting its negotiability. With them, the order is payable only upon contingency, or condition, and that is upon the production of the drawer's bank book. This is rendered imperative from the language employed, and the bank upon which the order is drawn, would have the right to insist upon such production of the book in compliance with the terms of the order; and the case shows that it has refused payment upon presentation of the order for the reason that it was not accompanied by the bank book. It cannot, therefore, be regarded as payable absolutely and without any contingency that would embarrass its circulation. The drawer has it in his power to defeat its payment by withholding the bank book. Certainly the bank book of the depositor is within his own control rather than that of the indorsee of this order.

It was the necessity of certainty and precision in mercantile affairs and the inconveniences which would result if commercial paper was incumbered with conditions and contingencies, that led to the establishment of an inflexible rule that to be negotiable they must be payable absolutely and without any conditions or contingencies to embarrass their circulation. (*American Ex. Bank v. Blanchard*, 7 Allen, 333.) In that case the words, "subject to the policy," being included in a promissory note, were held to render the promise conditional and not absolute, and so the note was held not to be negotiable. (*Noyes v. Gilman*, 65 Maine, 589, 591; *Hubbard v. Mosely*, 11 Gray, 170.)

A case in every essential like the one we are considering was before the Supreme Court of Pennsylvania in 1891. A *fac simile* of the order is given in the opinion. No two cases could be nearer alike. There, as here, the order was drawn on a savings bank. The suit was by the indorsee against the drawer as in this case. There, as here, the order contained a statement upon its face, but below the signature of the drawer, that the "Deposit book must be at bank before money can be paid." In discussing the question of its negotiability cases are cited from the courts of Maine, Vermont, Massachusetts and New York, as well as from Pennsylvania. In the course of the opinion the court says:

"It sufficiently appears from the memoranda on its face that it was drawn on a specially deposited fund held by the bank subject to certain rules and regulations, in force between it and the depositor, requiring certain things to be done before payment could be required, viz.: previous notice of depositor's intention to draw upon the fund, return of the notice ticket with the order to pay, and the presentation of the deposit book at the bank, so that payment might be entered therein. \* \* \* It is, in substance, merely an order on the dollar savings bank to pay J. W. Quinn, or order, nine hundred dollars in nine weeks from date, or February 1, 1888, provided he or his transferee present to the bank, with the order, the notice ticket, and also produce at and before the time of payment the drawer's deposit book. As already remarked, these are undoubtedly prerequisites which restrain or qualify the generality of the order to pay as contained in the body of the instrument. They are also prerequisites with which it may be difficult, if not sometimes impossible, for the payee, transferee, or holder of such an order to comply." (*Iron City Nat. Bank v. McCord*, 139 Pa. St. 52, 23 Am. State Rep. 166.)

The order in question was drawn upon a savings bank, and it is common knowledge that all such banks in this State have a by-law which all depositors are required to subscribe to, that "no money shall be paid to any person without the production of the original book that such payment may be entered therein."

This court in the case of *Sullivan v. Lewiston Inst. for Savings* (56 Maine, 507), has considered the purpose and necessity of these salutary regulations. We should be slow to countenance any departure from this rule needed for the protection of depositors in our savings banks now numbering more than 160,000, and where deposits aggregate nearly \$60,000,000.

Inasmuch as this order is not negotiable and no suit can be maintained upon it by the plaintiff as indorsee, it becomes unnecessary to consider the other exceptions.

Exceptions sustained.

(b) *An order or promise to pay out of a particular fund is conditional.*<sup>8</sup>

§ 22

WORDEN v. DODGE.

4 DENIO (N. Y.) 159. — 1847.

ASSUMPSIT. On the trial the plaintiff gave in evidence an agreement, signed by the defendants, bearing date October 12, 1839, by which, for value received, they jointly and severally promised to pay to the plaintiff, by his name or order, \$250, with interest, payable one-half in two years and the other half in three years from the day of said agreement, "out of the net proceeds, after paying the cost and expenses of ore to be raised and sold from the bed on the lot this day conveyed by Edward Madden to Edwin Dodge, which bed is to be opened and the ore disposed of as soon as conveniently may be."

On reading the agreement the plaintiff rested, and the defendants moved for a nonsuit, as the plaintiff had not shown that the defendants had received enough from the ore to pay the note, nor had they shown any default or negligence on their part. The judge held that the plaintiff could not recover without proving that the defendants had received funds from the ore to enable them to pay, or had neglected to work the ore bed, and directed a nonsuit.

The plaintiff excepted.

*By the Court*, BEARDSLEY, J. — The nonsuit was proper. A promissory note must be payable absolutely, and not upon any contingency as to time or event. (3 *Kent*, 5th ed. p. 74; *Smith* on Merc. Law, 113, 116; *Story* on Prom. Notes, §§ 1, 22 to 26; *Id.* on Bills of Exch. §§ 46, 47; *Chit.* on Bills, 10th Amer. ed., p. 132 to 139.)

This was not such an engagement, for although the promise was to make payments at certain specified times, the payments were to be made "out of the net proceeds" "of ore to be raised and sold" from a certain ore bed. Here was a contingency; the fund might turn out to be inadequate, in which case there would be no obligation to pay at any time. It is not a promise to pay "absolutely and at all events," as a promissory note always is.

New trial denied.<sup>9</sup>

<sup>8</sup> See note in 125 Am. St. Rep. at page 196. — C.

<sup>9</sup> "Please pay A. B., or order, \$500, for value received, . . . out of the proceeds of the claim against the Peabody Estate, now in your hands to collect, when the same shall have been collected by you," is not a negotiable instrument, as the money is payable out of a particular fund. *Richardson v. Carpenter*, 46 N. Y. 660.

"You will please pay to A. B. the amount of a note for \$2,000, dated December 31st, 1868, and deduct the same from my share of the profits of



(c) *An indication of a particular fund does not render promise conditional.*<sup>1</sup>

## § 22

## SCHMITTLER v. SIMON.

101 NEW YORK, 554. — 1886.

RUGER, Ch. J. — The plaintiff claimed to recover as the holder of a draft drawn upon and accepted by the defendant, reading as follows:

NEW YORK, February 26, 1877.

MR. ADAM SIMON, executor, will please pay to Johannes Schmittler or his order, on the first day of July, which will be in the year 1879, the sum of \$900, with seven per cent. interest, to be paid besides this amount yearly, July month, and charge the amount against me and of my mother's estate.

WILLIAM J. SCHAREN.

[Written upon the face]: Accept, ADAM SIMON, *executor*; [and indorsed]: Pay to the order of Mary Schmittler, the amount of note.

JOHANNES SCHMITTLER.

Upon the trial, after proving the execution of the draft, its acceptance and transfer, and offering to prove the payment of a consideration by the plaintiff to the payee, which was objected to by defendant, and excluded by the court, the plaintiff rested. The defendant thereupon moved to nonsuit upon the ground that the obligation was not binding upon the defendant personally, but he was liable thereon, if at all, in his representative character alone, and that it was payable out of a specific fund, and a recovery thereon could not be had without proving the existence and extent of such fund. The court thereupon nonsuited the plaintiff, to which decision she excepted. The General Term having affirmed the determination of the trial court, the plaintiff took this appeal.

We think the court below erred as to both of the grounds upon which their judgment proceeded. That the defendant was liable upon the draft, if liable at all, in his individual capacity alone, seems under the authorities to admit of no doubt.<sup>2</sup> \* \* \*

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our partnership business in malting," is not a bill of exchange, for it is payable out of an uncertain fund, from profits. *Munger v. Shannon*, 61 N. Y. 251.

JOSSelyn v. LACIER, 10 Mod. R. 294, 316. — 1715. Evans drew a bill upon Josselyn, requiring him to pay Lacier seven pounds every month out of the growing subsistence of Evans, and place it to his account. Josselyn accepted it, and afterward refused to pay. PARKER, C. J. — "We are all of opinion that it is not a bill within the custom of merchants; it concerns neither trade nor credit; it is to be paid out of the growing subsistence of the drawer; if the party die, or his subsistence be taken away, it is not to be paid." Accord: *Jenney v. Herle*, 2 Ld. Raym. 1361; *McGee v. Larramore*, 50 Mo. 425; *Jackman v. Bowker*, 4 Met. (Mass.) 235. — H.

<sup>1</sup> See note in 125 Am. St. Rep. at page 196. — C.

<sup>2</sup> On a subsequent appeal, after a new trial, the court thought this result might be qualified by parol evidence. s. c. 114 N. Y. 177. See Neg. Inst. L. § 74. — H.

Being of the opinion, therefore, that the defendant is liable upon the draft in question in his individual capacity alone, the question still remains as to the extent of such liability. \* \* \* The court below held that the draft in question was payable only from a particular fund, and was, therefore, non-negotiable, and enforceable only to the extent of the fund referred to.

Considering the question as we are compelled to do from the language of the instrument alone, we are unable to agree to the interpretation thus put upon it. It is not claimed that there is any distinction between the instrument in question and an ordinary bill of exchange except that made by the clause referring to the mother's estate. Unless that clause deprives the paper of its commercial character, the rights and liabilities of the parties thereto must be governed by the rules pertaining to negotiable securities, which would render the defendant liable for the amount named in the draft, upon the theory that his acceptance was an admission by him of assets applicable to its payment.

The distinction between a fund from which a draft or order is directed to be paid, and one referred to as the means of reimbursement to its drawee, is a material one and cannot be disregarded in the construction of such instruments. Thus it is said: "When a reference is made to a special fund merely as a direction to the drawee how to reimburse himself, and the payment is not made to depend upon the adequacy of the fund, it will not vitiate the bill." (*Edw. on Bills and Notes*, § 158; see also *Parsons on Merc. Law*, 87; *Chitty on Bills*, 158.) Dwight, Com., in *Munger v. Shannon* (61 N. Y. 255), says: "A bill is an order drawn by one person on another to pay a third a certain sum of money absolutely and at all events. Under this definition the order cannot be paid out of a particular fund, but must be drawn on the general credit of the drawer, though it is no objection, when so drawn, that a particular fund is specified from which the drawee may reimburse himself." Judge Rapallo in *Brill v. Tuttle* (81 N. Y. 457), says: "If a draft be drawn generally upon the drawee, to be paid by him in the first instance, on the credit of the drawer and without regard to the source from which the money used for its payment is obtained, the designation by the drawer of a particular fund, out of which the drawee is to subsequently reimburse himself for such payment, or a particular account to which it is to be charged, will not convert the draft into an assignment of the fund, and the payee of the draft can have no action thereon against the drawee unless he duly accepts." In that case the drawee refused to accept and the action was sought to be maintained upon the theory of an equitable assignment. It was held under the peculiar circumstances of the case, and the form of the instrument, that it did transfer the fund.

It is thus seen that the mere mention of a fund in a draft, does not necessarily deprive it of the character of commercial paper, but it must further appear, in order to have that effect, that it contains either an express or implied direction to pay it therefrom, and not otherwise.

The question, therefore, to be determined here is, whether the fund in question is referred to as the measure of liability or the means of reimbursement. While the point is not free from doubt, we think a reasonable construction of the draft favors the conclusion that it is mentioned only as the source of reimbursement. No express language in it can be pointed out as requiring its payment from the fund mentioned, and none from which that requirement can be implied, except such as exists in all drafts where a fund is referred to. Its language is to "charge the amount against me and of my mother's estate" and contains no provision for delay until the amount is realized from the estate, or for payment *pro tanto* in case the estate should prove insufficient to pay the whole amount. There is no language importing a transfer of the fund to the payee, and nothing from which such an intention can be inferred. The draft contains an absolute direction to pay a fixed sum, at a specified date, with interest. It imports a present indebtedness of a sum named, from the drawee to the payee, and an absolute direction to pay that sum at a fixed date, subject to no contingency either as to time or amount. In express language he directs the amount when paid to be charged against him individually, and adds the words, plainly implying, as we think, that the fund for the acceptor's reimbursement would be found in an amount eventually, or immediately payable to the drawer from his mother's estate.

We think, also, that the insertion of words expressly making the paper negotiable, was quite significant and indicated an intention on the part of all parties, that it would be transferable, and partake of the character of commercial paper. Any contingency inferable from the language of the draft, making the amount payable thereon indefinite and uncertain, would tend largely to depreciate its value for such purpose, and defeat the intention with which it was apparently made.

If the language of the paper could be considered at all ambiguous, it was the duty of the defendant to limit his liability by apt words of acceptance when it was presented to him, but as it is, he has unqualifiedly promised to pay a fixed and definite sum at a specified time, and we think, should be held to the contract which other parties were authorized by his acceptance to infer he intended to make.

The case of *Tassey v. Church* (4 Watts & Sergeant, 346), seems quite in point. The instrument there read:

\$555.48.

ALLEGHANY, 1st July, 1840.

Please pay Church, McVay & Gordon \$555.48 and charge the estate of Thomas C. Patterson.

ADAM FLEMMING, *Trustee*.To JOHN TASSEY, *Administrator*.[Indorsed]: Accepted, JOHN TASSEY, *Administrator*.

Fleming was the trustee of Mrs. Patterson, who was the heir at law of Thomas C. Patterson; Tassey was the administrator of Patterson's estate. It was held that the promise of the acceptor was unconditional and bound him absolutely. In *Childs v. Monins* (6 Eng. C. L. 228), the defendants, as executors of the estate of Thomas Taylor, promised to pay £200 on demand with interest, signing as executors. It was held that they became personally liable, and that the plea of *plene administravit* was no defense. It was further held that the promise to pay interest made the debt that of the administrators personally. In *Kelly v. Brooklyn* (4 Hill, 263), the action was upon an order drawn by the mayor upon the treasurer of the defendant in the following words: "Pay Alexander Lyon or order \$1,500 for award No. 7, and charge to Bedford Road Assessment." It was held that it was a bill of exchange and not payable from a particular fund. For further illustration of the point under discussion we would refer to *Hollister v. Hopkins* (13 Hun, 210); *Redman v. Adams* (51 Me. 429); *Luff v. Pope* (5 Hill, 413). The case of *Tooker v. Arnoux* (76 N. Y. 397), is referred to by the respondent as sustaining the views of the court below; but we are of the opinion that it cannot be so regarded. The order there directed the drawee to pay a certain sum out "of the money to be realized from the sale" of certain houses. This order was accepted, and it was held that a sale of the houses was a condition precedent to any liability on the part of the acceptor. This was the plain language of the contract.

In all the cases examined by us where an order has been held to operate as an equitable assignment of a fund, there were either special phrases contained in the instrument, indicating an intent to have it so operate, or ambiguous language used, which, construed in the light of surrounding circumstances, justified the inference of a limitation of liability. (*Parker v. Syracuse*, 31 N. Y. 376; *Alger v. Scott*, 54 id. 14; *Munger v. Shannon*, 61 id. 251; *Erichs v. De Mill*, 75 id. 370; *Brill v. Tuttle*, *supra*.) Here, however, there is no such language, and this contract is to pay a fixed amount at a specified date, absolutely and unconditionally.

We are, therefore, of the opinion that the instrument in question is a bill of exchange and rendered the parties executing it liable absolutely for the amount stated therein.

The judgment of the courts below should be reversed and a new trial ordered, with costs to abide the event.

All concur.

Judgment reversed.<sup>3</sup>

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3 "Please pay to order of G. F. and C. W. Tilden forty dollars, and charge same against whatever amount may be due me for my share of fish caught on board schooner 'Morning Star' for the fishing season of 1860." Held negotiable in *Redman v. Adams*, 51 Me. 429. "In this case the order requires the drawees to pay to the order of G. F. and C. W. Tilden the sum of forty dollars, absolutely and without contingency. A means of reimbursement is indicated to the drawees in the words appended, 'and charge the same against whatever amount may be due me for my share of fish,' etc., but the payment of the order is not made to depend upon his having any share of fish, nor is the call limited to the proceeds thereof." BARROWS, J., on p. 433.

A bill reading, pay to the order of A, \$1,500, "on account of contract between you and the Snyder Planing-mill Company" signed by the company, held to be negotiable. "Section 10 (N. Y. § 22) of our negotiable instruments law, which is merely declaratory of the common law upon the subject, reads as follows: . . . The controversy is thus narrowed down to whether the words 'on account of contract between you and the Snyder Mill Company' amount to a direction to pay out of a particular fund, or, on the other hand, are to be considered as simply indicating the fund from which the drawee, Lightner, might reimburse himself. . . . The weight of authority and reason supports the proposition that the words amount to no more than an indication of the fund from which the drawee is to reimburse himself. The words used are substantially the same as though the orders read 'and charge to account of contract with Snyder Planing-mill Company,' or 'credit to account of contract,' etc." PORTER, J., in *First National Bank v. Lightner*, 74 Kan. 736, 742. See this case with notes in 8 L. N. S. 231, 118 Am. St. Rep. 353, and 11 Am. and Eng. Ann. Cas. 596. See also note in 7 Col. Law Rev. 216.

In *Hibbs v. Brown*, 190 N. Y. 167, the action was to replevy stolen coupons originally attached to a bond issued by the Adams Express Company, an unincorporated joint stock association, and appellant's right to recover turned on the question whether said bond and coupons were negotiable. The bond was issued by the Express Company in its association name and was secured by a trust indenture conveying and pledging for its payment a large amount of securities and property. Among other clauses was one providing that "no person or future shareholder, officer, manager or trustee of the Express Company shall be personally liable as partner or otherwise in respect to this bond or the coupons pertaining thereto, but the same shall be payable solely out of the assets assigned and transferred to the said Trust Company or out of other assets of the Express Company."

Appellant claimed that this clause rendered the bond non-negotiable as it prevented the bond from being collected from the individual property of the members of the association and therefore made the remaining property from which it could be collected a particular fund. He pointed out the difference between a joint stock association and a corporation, contending that the individual liability of the members of the former is as essential a characteristic as it is in the case of a partnership, and that, therefore, it could not be eliminated without materially affecting the contract of the association.

Hiscock, J., held that "so many of the attributes and characteristics of a corporation have been impressed upon the modern joint stock association that

(d) *Statement of transaction which gives rise to instrument does not render promise conditional.*

§ 22 SIEGEL *v.* CHICAGO TRUST & SAVINGS BANK.

131 ILLINOIS, 569.—1890.

MR. CHIEF JUSTICE SHOPE delivered the opinion of the Court.

This was an action of assumpsit, by appellee, against appellants, upon the following instrument:

\$300.

CHICAGO, March 5, 1887.

On July 1, 1887, we promise to pay D. Dalziel, or order, the sum of three hundred dollars, for the privilege of one framed advertising sign, size — x — inches, one end of each of one hundred and fifty-nine street cars of the North Chicago City Railway Co., for a term of three months, from May 15, 1887.

SIEGEL, COOPER AND CO.

— which was indorsed by Dalziel, the payee, to appellee, for value on the day of its execution.

The first question presented is, is this instrument negotiable? — and this case has been answered affirmatively by the Circuit and Appellate Courts. The Appellate Court having affirmed the judgment in favor of the plaintiff, the case is brought here by appeal, upon certificate of importance granted by that court.

It appears, that before the time when the privilege of advertising was to commence Dalziel forfeited any right he may have acquired to use the cars in the manner indicated, and the privilege specified never was furnished appellants; and it is insisted that the instrument is a simple contract, only, and that therefore the same defense, — failure of consideration, — is available against the indorsee of the paper for value, and before due, as might be interposed against such paper in the hands of the payee. It is also insisted, that the instrument shows, on its face, that payment depended upon a condition precedent to be performed by the payee, and therefore the indorsee took it with notice, and by the failure of

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in my opinion, for the purposes of the question now before us, we are amply justified in regarding simply the joint, *quasi* corporate, entity, and in saying that an obligation issued in its name upon its general credit, and binding all its assets, complies with the requirements for a negotiable instrument, even though the practically unimportant individual liability of members is excluded." P. 177.

CULLEN, C. J., and WERNER and BARTLETT, JJ., held that if the clause were effective it would render the bond non-negotiable, but held, further, that the clause was void, and that the bond was therefore negotiable.

GRAY and HAIGHT, JJ., concurred with HISCOCK, J., and O'BRIEN, J., concurred with HISCOCK, J., in opinion, thus making the views in these opinions the holding of the majority of the court.

See note on "Negotiability of joint stock association bonds exempting shareholders' liability" discussing the Hibbs case in 8 Col. Law Rev. 215. See also 19 *Harv. Law Rev.* 616, and 21 *Harv. Law Rev.* 441. — C.

the payee to perform the condition, no right of recovery exists in the indorsee. It is not contended that the indorsee had any other notice than that contained in the instrument itself, and it is apparent that at the time of its indorsement, which was the day of its execution, no right to the consideration had accrued to the makers. It is a promise to pay a certain sum of money at a day certain, for a consideration thereafter to be rendered, and depends for its validity upon the implied promise of the payee to furnish the consideration at the time and in the manner stipulated, — that is, it is a promise to pay a sum certain on a particular day, in consideration of the promise of the payee to do and perform on his part. A promise is a valuable consideration for a promise.

But the question remains, whether the statement or the recital of the consideration on the face of the instrument impairs its negotiability, and, in this instance, amounts to a condition precedent. The mere fact that the consideration for which a note is given is recited in it, although it may appear thereby that it was given for or in consideration of an executory contract or promise on the part of the payee, will not destroy its negotiability, unless it appears, through the recital, that it qualifies the promise to pay, and renders it conditional or uncertain, either as to the time of payment or the sum to be paid. (*Daniel on Neg. Inst.* secs. 790-797; *Davis v. McCready*, 17 N. Y. 320; *State Nat. Bank v. Casson*, 39 La. Ann. 865; *Goodloe v. Taylor*, 13 N. C. 458; *Stevens v. Blunt*, 7 Mass. 240.)

In *State Nat. Bank v. Casson* (*supra*), it is said: "Plaintiff received the note before maturity, and before the failure of the consideration. Even if it were known to him that the consideration was future and contingent, and that there might be offsets against it, this would not make him liable to the equities between the defendant and the payee. It cannot affect the negotiability of a note that its consideration is to be hereafter realized, or that, from contingency, it may never be enjoyed."

The most that can be said of a recital in the instrument itself, of the consideration upon which it rests, is, that the indorsee, taking it before maturity, is chargeable with notice of the recital. Such recital, however, is not sufficient, of itself, to advise him that there was, or would necessarily be, a failure of consideration, but if, at the time of the indorsement, the consideration has in fact failed, the recital might be sufficient to put him upon inquiry, and, in connection with other facts, amount to notice. (*Henneberry v. Morse*, 56 Ill. 394.) The case at bar does not, however, fall within the rule just stated, for the assignment was made the same day the note was made, and by the terms of the recital it was apparent the payee was required to do no act till the 15th of May following, — an interval of seventy days.

There is a distinction, clearly recognized in the authorities, between an instrument payable at a particular day, and one payable upon the happening of some event; and the rule is, that where the parties insert a specific date of payment, the instrument is then payable at all events,—and this, although, in the same instrument, an uncertain and different time of payment may be mentioned, as, that it shall be payable upon a particular day, or upon the completion of a house, or the performance of other contracts, and the like. (*McCarty v. Howell*, 24 Ill. 341, and authorities *supra*.) But the doctrine of this and kindred cases, where there are both a certain day of payment and one more or less contingent, need not be here invoked, for the time of payment in the instrument under consideration is not made to depend upon the happening or not happening of any event, but is specific and certain, and must occur by the efflux of time, alone.

If, therefore, it be conceded, as it must, that a condition inserted in a promissory note, postponing the day of payment until the happening of some uncertain or contingent event, will destroy its negotiability and render the instrument a mere agreement, yet under the authorities, if by the instrument the maker promises to pay a sum certain at a day certain to a certain person or his order, such instrument must be regarded as negotiable, although it also contains a recital of the consideration upon which it is based, and although it further appear that such consideration, if executory, may not have been performed. Here, the money was payable, absolutely, on the first day of July, 1887,—a time when the contract for the advertising could not have been completed. If the instrument had remained the property of the payee, and upon its maturity and performance to that time, suit had been brought, it is clear that no plea of partial failure of consideration could have been sustained, for the reason that the entire term had not then expired. No analysis of the instrument itself is necessary. The most careful examination of it will fail to disclose a condition precedent to the payment of the money at the time stipulated. Nor is there anything in the recital of the consideration to put the indorsee upon inquiry at the time the indorsement was made. Indeed, it is clear that at that time no inquiry would have led to notice that Dalziel would fail to comply with his contract on the 15th of May thereafter, when the term was to commence. All that the recitals would give notice of was, that the note was given in consideration of an agreement on the part of the payee that the privilege of advertisement named should be enjoyed by the makers for three months, from May 15, 1887. Giving to the language employed its broadest possible meaning, it cannot be construed as notice to the indorsee of the future breach of the contract by Dalziel. The presumption of law would be, that the



contract would be carried out in good faith, and the consideration performed as stipulated. The makers had put their promissory note in the hands of Dalziel upon an express consideration which they were thereafter to receive, and for the performance of which they had seen fit to rely upon the undertaking of Dalziel, and we are aware of no rule by which they can hold this indorsee for value, before due and before the time of performance was to begin, chargeable with notice that the promise upon which the makers relied would not be kept and performed. (*Wade on Notice*, § 94a; *Loomis v. Maury*, 15 N. Y. 312; *Davis v. McCready*, *supra*.) \* \* \*

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.<sup>4</sup>

## § 22

## CHOATE v. STEVENS.

116 MICHIGAN, 28. — 1898.

HOOKE, J. — The defendants have appealed from a judgment upon three written instruments, substantially alike, of one of which the following is a copy: “\$115.00. Detroit, July 25, 1893. For value received, March 16, 1895, after date, I promise to pay to the order of Low’s Art Tile Soda-Fountain Co., one hundred and fifteen dollars, with interest 6 per cent. The consideration of this and other notes is the soda-draught apparatus described in contract of same date as this and other notes, which soda-draught apparatus the undersigned has received of said Low’s Art Tile Soda-Fountain Co. Nevertheless it is understood and agreed by and between the undersigned and the said Low’s Art Tile Soda-Fountain Co. that the title to the above-mentioned property does not pass to the undersigned, and that, until all said notes are paid, the title to the aforesaid shall remain in the said Low’s Art Tile Soda-Fountain Co., who shall have the right, in case of nonpayment at maturity of either of said notes, without process of law, to enter and retain immediate possession of said property, wherever it may be, and remove the same. Payable at the Preston National Bank.”

Each bears, as an indorsement, the name of the payee. The defendants say that they were improperly admitted in evidence, for the reason that they are not promissory notes, and, if the indorsements are to be treated as an assignment of the chose in action, it should have been alleged in the declaration; and, further, that there was

<sup>4</sup> Accord: *Chase v. Behrman*, 10 Daly (N. Y.) 344. Contra: *Jarvis v. Wilkins*, 7 M. & W. 410, where the instrument read: “I undertake to pay A. B. the sum of £6 4s., for a suit of, ordered by Daniel Page.” *Fletcher v. Thompson*, 55 N. H. 308. — H.

no evidence that the plaintiff was the owner of the notes sued upon. Both briefs indicate that the question considered most important, if not decisive of the case, is that of the negotiability of the notes. The instruments—to the end of the fifth line<sup>5</sup>—are in form promissory notes. If there were nothing more, they would be as perfect and complete promissory notes as it is possible to make. The writing proceeds to state the consideration for said notes, which, though not essential, was harmless. (*Wright v. Irwin*, 33 Mich. 32.) This is followed by the statement that the parties agree that the title to the property for which the notes were given shall remain in the payee, who, in case of nonpayment at maturity of either of said notes, “may enter and retain immediate possession of the property, without process of law, wherever it may be, and remove the same.” If it can be said that this writing shows a sale of the soda fountain, as contradistinguished from a contract to sell, the provisions as to title amount to no more than a chattel mortgage. MR. JUSTICE HARLAN said in the case of *Chicago Ry. Equipment Co. v. Merchants’ Bank*, 136 U. S. 280, 10 Sup. Ct. 1002: “The fact that, by agreement, the title is to remain in the vendor of personal property until the notes for the purchase price are paid, does not necessarily import that the transaction was a conditional sale.” In that case the court was able to find from the evidence that the parties intended to effect a sale, and that the title reserved was merely the title of a mortgagee. The distinguished jurist added that “each case must depend upon its special circumstances,” which proposition is emphasized by the case of *Harkness v. Russell*, 118 U. S. 663, 7 Sup. Ct. 51, where the facts were held to show a conditional, and not an absolute, sale. If we can place this construction on this transaction,—i. e. that it was a sale,—there is no difficulty in sustaining the negotiability of this note, under our own decisions. See *Brooke v. Struthers* (110 Mich. 562; *Wilson v. Campbell*, id. 580.)

The record shows that the soda fountain was furnished under a written contract, and that these notes were given some days later after delivery, in accordance with its terms. If we were to consider the provisions of this contract, we should not hesitate to say that this was a sale with a reservation of title by way of security. As said in *Brooke v. Struthers* (110 Michigan, 562), there are cases which hold that a contemporaneous writing may be examined to determine the negotiability, or non-negotiability of a note. See cases cited. While, perhaps this contract is not strictly a contemporaneous writing, it was one of the surrounding circumstances under which the notes were made. But we find it unnecessary to pass upon that question, as we think the same is implied by the notes. These being

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<sup>5</sup> Through the words: “With interest 6 per cent.”

negotiable notes, a declaration upon the common counts was sufficient under our well-settled rule. \* \* \*

We find no error in the record, and the judgment is affirmed. The other justices concurred.<sup>6</sup>

## § 22

## WORDEN GROCER CO. v. BLANDING.

126 NORTHWESTERN REPORTER (MICH.) 212. — 1910.

Action on the following note:

\$150.

CORAL, MICH., April 2, 1903.

Sixty days after date, for value received, we promise to pay to the order of Fred Soules, one hundred and fifty dollars, at the bank of O'Donald & Scott at Howard City, Michigan, with interest at 7 per cent. per annum until paid. This note is given subject to the approval of Fred Soules, Coral, Michigan, for a stock of groceries invoiced at \$933.00 this day received of Fred Soules; the title to the said stock of groceries to remain in said Soules until this note is fully paid.

W. A. BLANDING.

JAMES BLANDING.

There appeared on the back of the note the indorsement "Fred Soules, Coral, Mich."

Judgment for defendants, and plaintiff brings error.

BLAIR, J. — \* \* \*

First. The principal question in this case is whether the note in question is negotiable on its face. Counsel for plaintiff contend

<sup>6</sup> See this case reported with note in 43 L. R. A. 277.

"The real purpose of this clause (namely. § 22, subd. 2), as we learn from Mr. Crawford (Crawf. An. Neg. Inst. L., p. 12), who drafted the act, and from Judge Brewster (10 Yale Law Jour., p. 87), is to cover the case of a note which contains a statement that it is given for a chattel, which is to be the property of the owner until the note is paid. Such notes are usually regarded as negotiable (citing the *Choate* case and *Chicago Co. v. Merch. Bk.*, 136 U. S. 268; *Howard v. Simpkins*, 69 Ga. 773; *Heard v. Dubuque Bk.*, 8 Neb. 10; *Mott v. Havana Bk.*, 22 Hun, 354; *Nat. Bk. of Royersford v. Davis*, 6 Montg. Co. 99; *Kimball v. Mellon*, 80 Wis. 133). Several states, however, have taken the opposite view, holding that such notes are non-negotiable (citing *Sloan v. McCarthy*, 134 Mass. 245; *South Bend Co. v. Paddock*, 37 Kan. 510; *Third Nat. Bk. v. Armstrong*, 25 Minn. 530; *Deering v. Thorn*, 29 Minn. 120), and it was to bring the latter states into accord with the more general view and unify the law on this point that this clause was inserted." McKeehan, 41 Am. Law Reg., N. S., p. 443.

See further in Mr. McKeehan's article for a statement of the doubts which have been raised as to whether this subdivision of the law will accomplish the above result. In this connection note the following case of *Worden Grocer Co. v. Blanding*. See also *Kimpton v. Studebaker Bros. Co.*, 14 Idaho, 552, where a title retaining note was held non-negotiable under §§ 20 and 24 of the Negotiable Instruments Law. The effect, however, of § 22, subd. 2, was not discussed. See the authorities pro and con in the notes to this case in 125 Am. St. Rep. 194, and in 14 A. & E. Ann. Cas. 1129. — C.

that it is, under the alleged general rule that a reservation of title does not destroy the negotiability of a note; citing 4 Am. & Eng. Ency. of Law, p. 127, and authorities cited in footnote 4. Reliance is also had upon the case of *Choate v. Stevens* (116 Mich. 28); as approved in *Van Den Borch v. Bowman* (138 Mich. 624). We are unable to agree to the plaintiff's contention that this case is ruled by *Choate v. Stevens*. So far as this record discloses, the note in question contains the entire contract of the parties, and it is obvious from a consideration of its terms that it presents the ordinary case of a conditional sale in which the title never passed to the defendants, and not a completed sale with a reservation of title in defendants by way of security only. (*Bunday v. Columbus Machine Co.* 143 Mich. 10). On the other hand, the case of *Choate v. Stevens* was held to present a case of a completed sale with reservation of title by way of security only, and the judgment of the court proceeded upon that basis. We are of the opinion that this case falls within the rule of *Wright v. Traver* (73 Mich. 493). In that case the court said: "The instrument before us has more the appearance of a contract of sale, with the title reserved in the property to the seller until paid for, than it has of a promissory note." And it was held that the condition contained in the note that, "if not paid when due, the property for which it is given shall be the property" of the payee, destroyed its character as a promissory note, and reduced it to a mere contract.

The precise question involved here was before the Supreme Judicial Court of Massachusetts, and it was held that an instrument otherwise a promissory note was converted into a mere contract by the condition, "Said horse to be and remain the entire and absolute property of the said Sloan until paid for in full by me." *Sloan v. McCarty* (134 Mass. 245). We are of the opinion, therefore, that the court did not err in treating the instrument in question as non-negotiable.

[On other grounds, however, the judgment was reversed and a new trial granted].

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#### 4. THE SUM TO BE PAID MUST BE CERTAIN.

(a) *What amounts to certainty generally.*<sup>7</sup>

§ 20

DODGE v. EMERSON.

34 MAINE, 96. — 1852.

ASSUMPSIT, by the indorsee against the makers of a note payable to the Protection Insurance Company or order, for "\$271.25, with

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<sup>7</sup> See note in 125 Am. St. Rep. at p. 203. — C.

such additional premium as may arise on policy No. 50, issued at the Calais agency."

APPLETON, J. — No principle of law is more fully established by authority and the universal concurrence of the commercial world, than that to make a written promise a valid promissory note, it must be for a fixed and certain, and not for a variable amount. In France it is so determined by the provisions of the Code Napoleon. It is the recognized mercantile law of continental Europe. In England and in this country, it has received the sanction of repeated and well-considered adjudications. (*Story on Promissory Notes*, § 20.) Without this essential requisite, a written promise, though in terms payable to order, is to be regarded as a simple contract and not negotiable.

The defendants in this case have promised to pay two several sums; one certain and definite, the other uncertain and contingent. The defendants' liability being for both these sums, is obviously for an unascertained and indefinite amount.

It is insisted in argument, that the plaintiff may abandon all claim for the additional premium, which is uncertain, and proceed only for the certain sum expressed in the contract. Undoubtedly he may take judgment for any sum less than the amount due, and in that mode abandon a portion of his legal claims, but that still leaves the contract in its original state, and can in no way affect its legal construction. He could not erase the clause relating to the additional premium, without thereby making such an alteration in the instrument declared on, as would discharge the defendants.

In *Smith v. Nightingale* (2 Stark. R. 375), the promise was to pay the payee sixty-five pounds and all other sums that may be due him, and it was claimed for the plaintiff, to whom the interest in the contract had passed by indorsement, that he might disregard the latter clause and recover on the certain sum set forth in his contract as indorsee, but the Court decided otherwise. (*Davis v. Wilkinson*, 10 Adol. & El. 98.)

The inquiry is made by the counsel for the plaintiff, whether the clause providing for the payment of an additional sum, introduced after the promise to pay the sum fixed and certain, controls that sum so as to make it in any event uncertain. The amount due to the plaintiff is uncertain. Whether the contract is to be regarded as a promise to pay one sum, which shall be the aggregate composed of a certain and of an uncertain sum, the amount of which is to be ascertained at some subsequent time, or as a promise to pay two sums, one fixed and the other uncertain, is perfectly immaterial. In either case there is no precise and ascertained amount due by the contract, and it cannot be regarded as a promissory note. If it was not in its origin, it cannot be made one by any abandonment,

which the plaintiff may deem it advisable to make, of any portion of the sum due him. The contract declared on not being in its character negotiable, the action cannot be maintained by the present plaintiff.

Plaintiff nonsuit.<sup>8</sup>

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§ 20 MR. JUSTICE BRADLEY IN *PARSONS v. JACKSON*.

99 UNITED STATES, 434, 438, 440. — 1878.

EACH bond, on its face, certifies "that the Vicksburg, Shreveport, and Texas Railroad Company is indebted to John Ray, or bearer, for value received, in the sum of either £225 sterling or \$1,000 lawful money of the United States of America, to wit, £225 sterling if the principal and interest are payable in London, and \$1,000 lawful money of the United States of America, if the principal and interest are payable in New York or New Orleans," etc. This is the obligatory part of the instrument, and is necessarily indeterminate in its character without some further designation of the place at which it is to be paid. Each bond, further, on its face declares that "the president of said company is authorized to fix, by his indorsement, the place of payment of the principal and interest in conformity with the terms of this obligation." And on the back of the bonds is indorsed a printed blank in the following words, to wit, "I hereby agree that the within bond and the interest coupons thereto attached shall be payable in \_\_\_\_." \* \* \*

The uncertainty of the amount payable, in the absence of the required indorsement, is of itself a defect which deprives these instruments of the character of negotiability. As they stand, they amount to a promise to pay so many pounds, or so many dollars, — without saying which. One of the first rules in regard to negotiable paper

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<sup>8</sup> "\$350, and also such additional premium as may become due on said policy," is uncertain. *Palmer v. Ward*, 6 Gray (Mass.) 340; *Marrett v. Equitable Ins. Co.*, 54 Me. 537.

"\$1,000, or what might be due after deducting all advances and expenses," is uncertain. *Cushman v. Haynes*, 20 Pick (Mass.) 132.

"\$300, subject to the provisions contained in an agreement this day made between C and myself," is uncertain where the agreement referred to provides for a contingent deduction. *Dilley v. Van Wie*, 6 Wis. 206.

\$60, but \$50 if paid by Jan. 1st, is uncertain. *Fralick v. Norton*, 12 Mich. 130.

\$200, award of assessor of damages to be subtracted, and on payment of award note delivered up, is uncertain, and in the nature of a penal bond. *Ellett v. Eberts*, 74 Iowa 597.

"Pay A B for 68 bu. wheat in store at three cents below first quality wheat," is uncertain. *Lent v. Hodgman*, 15 Barb. (N. Y.) 274. — H.

is that the amount to be paid must be certain, and not be made to depend on a contingency. (1 *Daniel*, Neg. Inst., § 53.) And although it is held that *id certum est quod certum reddi potest*,—a maxim which would have given the bonds negotiability in this instance, had the requisite indorsement been made,—yet, without such indorsement, the uncertainty remains, and operates as an intrinsic defect in the security itself.

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(b) *Engagement to pay interest: contingency.*<sup>9</sup>

§ 21

PARKER v. PLYMELL.

23 KANSAS, 402. — 1880.

JUDGMENT for defendants and plaintiff appeals.

BREWER, J. — This was an action on two notes, and for a foreclosure of the mortgage given as security for them. The plaintiff was a *bona fide* holder for value, before maturity. No actual notice of any defenses was shown. The notes were negotiable, unless and save as affected by the following matters. The promise was to pay interest at twelve per cent., after *maturity*; and after this promise were these words: "If this note is not paid at maturity, the same shall bear twelve per cent. interest from date." As a fact, there was usury in the inception of the notes. As a conclusion of law, the court held, that by reason of the words above quoted, the purchaser took the notes, charged with notice of the usury; and this presents the sole question for our consideration.

Clearly, these words do not destroy the negotiability of the paper.

They do not leave uncertain either the fact, the time, or the amount of payment. Indeed, up to and including the maturity of the notes, they are entirely without force. They become operative only after the notes are dishonored and have ceased to be negotiable, and then there is no uncertainty in the manner or extent of their operation. They create, as it were, a penalty for non-payment at maturity, and the penalty the amount of which is definite, certain and fixed. \* \* \*

The judgment will be reversed, and the case remanded with instructions to render judgment for the full amount of principal and interest due upon the face of the papers.

All the justices concurring.<sup>1</sup>

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<sup>9</sup> See note in 125 Am. St. Rep. at p. 204. — C.

<sup>1</sup> Accord: *Crump v. Berdan*, 97 Mich. 297; *Hope v. Barker*, 112 Mo. 338. An option on the part of the debtor to pay interest in paper money at 7 3-10 per cent. or in gold at 6 per cent. does not destroy negotiability. *Dinsmore v. Duncan*, 57 N. Y. 573. — H.

## § 21

## MERRILL v. HURLEY.

6 SOUTH DAKOTA, 592. — 1895.

QUESTION was as to the negotiability of a note reading in part as follows: "we promise to pay \* \* \* six hundred dollars, with interest thereon at the rate of seven per centum per annum, payable semi-annually. \* \* \* If any part of the principal is not paid at maturity, it shall bear interest at the rate of twelve per cent. per annum, payable annually; and, if any interest remains unpaid twenty days after date, the principal shall become due and collectible at once without notice, at the option of the holder."

FULLER, J. — \* \* \* Upon the authority of *Hegler v. Comstock* (1 S. D. 138), the respondents' counsel contend that the foregoing is not a negotiable instrument. \* \* \* The provision in the note in the case of *Hegler v. Comstock*, considered by this court and found to be sufficient to destroy its negotiability, is as follows: "With interest from date until paid at the rate of ten per cent. per annum; eight per cent. if paid when due." While, in the opinion of the writer a promissory note, otherwise unobjectionable, meets the requirements, and stands the test of negotiability, when there is no date at which the exact amount then due cannot be ascertained by inspection and computation, this court has placed itself in line with a class of authorities which require such a degree of certainty that the exact amount to become due and payable at any future time is clearly ascertainable at the date of the note, uninfluenced by any conditions not certain of fulfillment; and the rule thus established must control cases subsequently arising, where the facts are substantially the same. But, in our opinion, the note in suit is clearly distinguishable from the note in the case of *Hegeler v. Comstock, supra*. That note is inherently uncertain as to the rate of interest that will be paid for the use of the money. There is nothing from which the payee or purchaser can determine with certainty the amount which he will realize upon his loan or investment, or the rate of interest that the note is drawing, until by reason of its dishonor it has lost every element and incident of negotiability. The same cannot be said concerning the note before us. If the maker of this note fails to perform his contract, he becomes absolutely liable to pay 12 per cent interest after a default exists; but the rate of interest before dishonor is unconditionally fixed at 7 per cent., and no act or omission of either party can change the stipulated rate of interest, which is, in effect 7 per cent. from date till due, and 12 per cent. thereafter, and, as there seems to be no condition not certain of fulfillment, we characterize and regard the note as a negotiable instrument. It was said in *Towne v. Rice* (122 Mass. 67), that "an instrument which in its terms and form is a nego-



tible promissory note does not lose that character because it also recites that an additional rate of interest will be paid after due." (*De Hass v. Roberts*, 59 Fed. 853; *Crumpp v. Berdan*, 97 Mich. 293.)

\* \* \* \* \*

In our opinion, there is no provision in the note in suit which, under the statute or mercantile law, destroys its negotiability.

## § 21

SMITH *v.* CRANE.

33 MINNESOTA, 144. — 1885.

ACTION by indorsee against maker. Court charged that "the instrument offered in evidence is not a promissory note, but is subject to all equities existing between the defendant and D. M. Osborne & Co., whether it was assigned before or after maturity." Defendant has a verdict, and plaintiff appeals from an order refusing a new trial.

BERRY, J.:—

\$100.

GOOD THUNDER, *July 24, 1882*...

For value received on or before the first day of January, 1884, I, or we, or either of us, promise to pay to the order of D. M. Osborne and Co. the sum of one hundred dollars, at the office of Gebhard and Moore, in Mankato, with interest at ten per cent. per annum from date until paid; seven, if paid when due.

W. J. B. CRANE.

A negotiable promissory note must be certain as to amount. (*Jones v. Radatz*, 27 Minn. 240.) It is so certain when the sum to become absolutely payable upon it at any given time is ascertainable upon its face. (1 *Daniel*, Neg. Inst., § 53; *Towne v. Rice*, 122 Mass. 67; *Jones v. Radatz*, *supra*.)

The defendants' position is that the foregoing instrument is rendered *uncertain as to amount* by the interest clause, and therefore is not a negotiable promissory note. As to the legal effect of such a clause the authorities disagree. Some hold that the *contract reserves* the higher rate of interest, with a provision for its *abatement*, upon a condition to be performed, and that, therefore, the difference between the two rates is not a penalty, but the *contract* is to be enforced according to its literal terms. The cases holding this view rest upon *Nicholls v. Maynard* (3 Atk. 519). (See *Walmesley v. Booth*, Barn. Ch. 478, 481; *Bonafous v. Rybot*, 3 Burr. 1370; *Waller v. Long*, 6 Munf. (Va.) 71.) Other authorities hold that the clause is the same *in effect* as if it had *reserved* the lower rate of interest, with a provision that if the indebtedness is not paid at maturity, interest shall run at a higher rate. (*Seton v. Slade*, 7 Ves. 265, and see *Stanhope v. Manners*, 2 Eden, 197; *Brockway v. Clark*, 6 Ohio, 45; *Longworth v. Askren*, 15 Ohio St., 370; *Brown v. Barkham*, 1 P. Wms. 652.) If this be the

true construction of the clause, it is generally agreed that the difference between the two rates is to be treated as a penalty. (*Talcott v. Marston*, 3 Minn. 238, (339); *Newell v. Houlton*, 22 Minn. 19; and cases last cited.)

In our opinion the view taken by the authorities last mentioned as to the legal effect of the interest clause under consideration, is the more sensible, and most in accordance with what would seem to be the real object of the parties to the contract. What the payee really wants is his money at the due date of the contract, and to secure *this* he holds an increase of the rate of interest over the debtor's head. In other words the increase is a penalty for the debtor's delinquency. Treating the increase as a *penalty*, it follows, under the decisions of the court before cited, that the note in suit will in law draw the same rate of interest before as after maturity,—that is to say, 7 per cent.,—and that, therefore (whatever might be the case if the interest clause were upheld according to its literal terms), the sum absolutely payable upon the instrument at any given time is thus made certain, as the principal, and 7 per cent. interest. \* \* \*

Order reversed and new trial directed.<sup>1</sup>

(c) *Engagement to pay by stated instalments; contingent instalments.*<sup>2</sup>

## § 21

## COOKE v. HORN.

29 LAW TIMES, N. S. (Q. B.) 369. — 1873.

THIS was an action upon a promissory note, tried before Honyman, J., at the York Summer Assizes. A verdict of 175*l.* 5*s.* 10*d.* was found for the plaintiff, leave being reserved to the defendant to move to enter a verdict for him, on the ground that the note was not good.

The form of the note was as follows:—

£170.

25th April, 1872.

We promise to pay to Messrs. M. H. Cooke and Co. 170*l.*, with interest thereon at the rate of 5*l.* per cent. per annum, as follows: the first payment, to wit, 40*l.*, or more, to be made on the 1st Feb. 1873, and 5*l.* on the first day of each month following until this note and interest shall be fully satisfied. And in case default shall be made in payment of any of the said instalments, the full amount then remaining due in respect of the said note and interest shall be forthwith payable.

<sup>1</sup> In *Conn. Mut. Life Ins. Co. v. Westerhoff*, 58 Neb. 379, it was held that a provision in a note that in default of the payment of the semi-annual interest instalment the whole debt will bear interest at a higher rate than it would by its terms otherwise bear, is in the nature of a penalty and will not be enforced. Followed in *Kendall v. Selby*, 66 Neb. 60. — C.

<sup>2</sup> See note in 125 Am. St. Rep. at p. 204. — C.

The note was signed by the defendant and one John Horn, since deceased.

BLACKBURN, J. — I do not think there should be any rule in this case. The objection to the note is, that if the first payment were more than 40%, which the note provides it might be, the subsequent instalments and the final time of payment would be indefinite. The amount of the note, however, is certain, and any variation in the time will depend only upon the defendant. No case has been cited which is an authority against this note; and by analogy with other objections, this one, as it seems to me, ought not to prevail. I do not see why a stipulation which enables the maker of a note to reduce his liability for interest, should prevent the instrument containing it from being a promissory note.

Quain and Archibald, JJ., concurred.

Rule refused.

## § 21 RIKER v. SPRAGUE MANUFACTURING CO.

14 RHODE ISLAND, 402. — 1884.

TILLINGHAST, J. — This case and the following one<sup>3</sup> are actions, this case against the maker and indorsers, and the following one against the indorsers only, of a large number of promissory notes, set out and declared on by the plaintiffs as negotiable, and are tried together, by agreement of parties, upon the defendant's petition for a new trial, in each case on the ground of certain alleged misrulings by the court at the jury trials, and also that the verdict was against the evidence in each case. The questions raised by the exceptions to the rulings of the court in this case, in so far as they were relied on at the trial, are *first*, whether the notes declared on are negotiable; and *second*, whether there was a waiver by the indorsers of demand and notice, which excused the plaintiffs from proofs thereof at the trial to the jury.

The notes are all in the following form, which is a copy of one of the notes in suit:

E. No.

\$1,000

PROVIDENCE, November 1st, 1873.

Three years from January 1st, 1874, for value received, the A. & W. Sprague Manufacturing Company promise to pay to the order of A. & W. Sprague One Thousand Dollars, with interest from January 1, 1874, payable semi-annually, at the rate of seven and three-tenths per cent. per annum, till said principal sum is paid, whether at or after maturity; and all instalments of interest in arrear shall bear interest at the rate aforesaid till paid, but reserving the

<sup>3</sup> *Post*, p. 105. — H.

right to pay this note before maturity in instalments of not less than five (5) per cent. of the principal thereof, at any time the semi-annual interest becomes payable. Principal and interest payable at their place of business in said Providence.

AMASA SPRAGUE,

*Treasurer.*

Countersigned,

Z. CHAFEE, *Trustee.*

[Indorsed]

A. & W. SPRAGUE.

The defendants contend that said notes are not negotiable for two reasons, namely: *first*, because the time of payment is uncertain; and *second*, because the amount to be paid is also uncertain.

If either of these grounds is established, the notes must be held not negotiable, and this action, as against the indorsers at least, cannot be maintained; for it is elementary law that amongst the essential requisites of a negotiable promissory note are certainty as to the amount to be paid, and certainty as to the time when the payment is to be made.

*First*, then, are the notes certain as to the amount? They are each for a definite, fixed, and certain sum, and the payment of this sum is not subject to any uncertainty or contingency. But the defendants urge that by reason of the reserved right on the part of the maker expressed in the body of the note, to pay the same before maturity, in instalments of not less than five per cent. of the principal thereof, at any time the semi-annual interest becomes payable, the amount of the note is rendered uncertain. We fail to see how the amount to be paid becomes any less certain by reason of this reservation. Suppose part payment to be made at one of the stated periods provided therefor: that is a payment on the principal of the note, and simply reduces said principal by so much as is paid, leaving the note as definite as to amount as it was before; so that although the amount actually due upon the principal of one of these notes at a given time in its existence might be different from the amount due at some other time, yet it would always be a fixed and certain amount, and the total sum payable would not be changed. The object of the law, therefore, in requiring certainty as to amount as well as to time of payment, which is to give to negotiable paper as far as possible the quality of a circulating medium, like money, and practically to make it represent money, is fully met in a note in this form.

The cases in which it has been held that there was not that certainty as to amount to be paid which the law requires in negotiable paper are those, in the main, where the principal of the note could not be determined by anything which appeared therein: as where a promise was made to pay a certain sum, "and all fines according to rule" (*Ayrey v. Fearnside*, 4 M. & W. 168); or a certain sum, and also "all other sums which may be due" (*Smith v. Nightingale*, 2 Stark. 375); or

a certain sum with interest, and also to pay "the demands of the sick club at, etc., in part of interest" (*Bolton v. Dugdale*, 4 B. & Ad. 619; *Davies v. Wilkinson*, 10 A. & E. 98); or a certain sum deducting what interest or money A. may owe the maker (*Barlow v. Broadhurst*, 4 Moore, 471); or a certain sum together with all cost of collection including attorney's fees (*Jones v. Radatz*, 27 Minn. 240; *Maryland Fertilizing and Manufac. Co. v. Newman*, 60 Md. 584; *Johnston v. Speer*, 92 Pa. St. 227.) These, and many others of like character, illustrate and make plain what is meant by the term "uncertain as to amount," as applied to promissory notes, and what degree of certainty is essential to render a note negotiable.

That no such uncertainty exists, however, in the notes declared on in the case at bar, is clearly manifest upon the most casual inspection thereof; and we conclude that, so far as certainty in amount is concerned, they unquestionably come within the rule which the adjudged cases make.

*Second*, then, are they certain as to time of payment?<sup>4</sup> And upon this point let us first ascertain what degree of certainty is meant by this expression. We think the rule of law is clearly this, namely: "that if the time of payment named in the note must certainly come, although the precise day may not be specified therein, it is sufficiently certain as to time." In other words, it must not depend upon any contingency: as to "when A. shall marry," (*Pearson v. Garrett*, 4 Mod. 242; or when a certain ship shall arrive (*Coolidge v. Ruggles*, 15 Mass. 387; *Grant v. Wood*, 12 Gray, 220; *Palmer v. Pratt*, 2 Bing. 185); or when a certain suit is determined (*Shelton v. Bruce*, 9 Yerg. 24; see, also, *Woodbury, Williams and English v. Roberts*, 59 Iowa. 348.) And here the maxim, *Id certum est quod certum reddi potest*, is applicable, although perhaps it is not as to the amount.

So in *Cota v. Buck* (7 Met. 588), it was held, Shaw, C. J., delivering the opinion of the court, that a note in the following form, namely: "For value received I promise to pay J. P., or bearer, \$570.50, it being for property I purchased of him in value at this date, as being payable as soon as can be realized of the above amount for the said property I have this day purchased of said P., which is to be paid in the course of the season now coming." was a negotiable promissory note, on the ground that it was payable at all events within a limited time, namely, "the coming season," and that whether that meant "harvest time or the end of the year, it must come by the mere lapse of time and that must be the ultimate limit of the time of payment."

So, also, in *Curtis v. Horn* (58 N. H. 504), a note payable "on or before the first day of May next," was held to be negotiable. In

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<sup>4</sup> See Neg. Inst. L., § 23. — H.

delivering the opinion of the court in that case, Justice Bingham said: "It is now the common law, that where the payment is made to depend upon an event that is certain to come, and uncertain only in regard to the time when it will take place, the note or bill is negotiable. In *Mattison v. Marks* (31 Mich. 421), it was held that a promise to pay "on or before" a day named stated the time for payment with sufficient certainty. In that case Cooley, J., said: "The legal rights of the holder are clear and certain; the note is due at a time fixed, and is not due before. True, the maker may pay sooner if he shall choose, but this option, if exercised, would be a payment in advance of the legal liability to pay, and nothing more. Notes like this are common in commercial transactions, and we are not aware that their negotiable quality is ever questioned in business dealings." (See, also, *Edwards on Bills and Notes*, 142; *Story on Promissory Notes*, § 27; *Wheatley v. Williams*, M. & W. 533; *Ernst v. Steckman*, 74 Pa. St. 13; *Daniel on Neg. Inst.*, §§ 43, 48.)

Indeed, the cases have gone so far in this direction as to hold that a note payable within a limited time after the death of a person named is sufficiently certain as to time. (*Cooke v. Colehan*, 2 Strange, 1217; *Colehan v. Cooke*, Willes, 393.) So, also, it has been repeatedly held that notes payable in instalments at fixed dates are negotiable. (*Van Buskirk v. Day*, 32 Ill. 260; *Carlon v. Kenealy*, 12 M. & W. 139.)

The cases of *Way v. Smith* (111 Mass. 523), and *Stults v. Silva* (119 Mass. 137), cited by the defendants, seem to support their position in the case at bar; but we prefer the reasoning of the court in *Cota v. Buck*, *ante*, to that given in the subsequent case of *Hubbard v. Mosely* (11 Gray, 170), upon which these cases seem to rest.

The case of *Carlos v. Fancourt* (5 Term Rep. 482), cited by the defendants, was one in which the note was made payable out of a fund that should arise from the sale of certain property, and was therefore held not negotiable because not payable at all events. It is in harmony with nearly all of the more modern decisions upon that point, and doubtless states the law correctly. (*Story on Prom. Notes*, § 25.) But we do not understand it to be seriously claimed in the case at bar, nor do we think it could be successfully claimed, that the notes are necessarily payable out of any particular fund or property; or, in other words, that the payment thereof is based upon any contingency whatever.

The notes in suit are made payable three years from January 1, 1874, with the reserved right on the part of the maker to pay the same before maturity, in part or in whole, at any time when the semi-annual interest becomes payable. They are payable at all events within a limited time, and payment cannot be enforced until the expiration of that time; but the maker reserves an option within that limit of which he may avail himself if he sees fit. But even this

option cannot be exercised except at certain periods which are definitely expressed in the notes.

We think that a note is negotiable if one certain time of payment is fixed, although the option of another time of payment be given.

As the notes in suit come clearly within both the letter and spirit of the rule which we have stated, we decide that they are negotiable promissory notes.

[Omitting portion on waiver of demand and notice.]

It therefore follows that the notes were properly admitted in evidence against the indorsers; and, there being no other defense than that concerning the negotiability of the notes, which we have already disposed of, that it was the plain duty of the court to direct a verdict for the plaintiffs. The petition for a new trial must, therefore, be denied, and judgment entered on the verdict.

Petition dismissed.<sup>b</sup>

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(d) *Engagement that on default the whole sum shall become due.*

§ 21

CARLON v. KENEALY.

12 MEESON & WELSBY (EXCH.) 139. — 1843.

ASSUMPSIT by the indorsee against the maker of a promissory note. The declaration stated, that the defendant on, etc., made his promissory note in writing, and delivered the same to T. C., and thereby promised to pay the said T. C., or order, 52*l.* 10*s.*, by two equal instalments, on the 1st of May, 1843, and the 1st of November, 1843, and that the whole amount, 52*l.* 10*s.*, should become immediately payable on default being made in payment of the first instalment. The declaration then averred, that T. C. endorsed the note to the plaintiff; that the defendant made default in payment of the first instalment, and that he had not paid the amount of the note.

Special demurrer, on the ground that, the second instalment on the said promissory note being made payable by way of condition and penalty immediately on default in payment of the first instalment, the note was not made according to the custom of merchants with regard to inland bills of exchange, and consequently the title thereto, and the right of action thereon, could not pass by endorsement. Joinder in demurrer.

LORD ABINGER, C. B. — Suppose the case of a note payable ten

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<sup>a</sup> \$50, to be paid in such instalments and at such times as the directors of said company may, from time to time assess or require, is a promissory note. *White v. Smith*, 77 Ill. 351; *Goshen Turnpike Co. v. Hurtin*, 9 Johns. (N. Y.) 217. But see *McClelland v. Norfolk Southern R. Co.*, 110 N. Y. 469, 475-6. — H.

days after sight — there the subsequent parties do not know *when* they are to be called upon. I think there is no ground for saying the defendant is not liable.

PARKE, B. — Now, to hold that actions could not be maintained upon such notes as this, would be to impugn all the established practice. Almost every note payable by instalments has such a condition. It is not a contingency — it depends on the act of the maker himself; and on his default, it becomes a promissory note for the whole amount. The point was in effect determined in *Oridge v. Sherborne* (11 M. & W. 374).

GURNEY, B., and ROLFE, B., concurred.

Judgment for the plaintiff.\*

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§ 21      MR. JUSTICE HARLAN IN CHICAGO RY. CO. v.  
            MERCHANTS' BANK.

136 UNITED STATES, 268, 285-6. — 1889.

UPON like grounds it has been held that the negotiability of the note is not affected by its being made payable on or before a named date, or in instalments of a particular amount. In *Ackley School Dist. v. Hall* (113 U. S. 135, 140), it was held that municipal bonds, issued under a statute providing that they should be payable at the pleasure of the district at any time before due, were negotiable; for, the court said: "By their terms, they were payable at a time which must certainly arrive; the holder could not exact payment before the day fixed in the bonds; the debtor incurred no legal liability for non-payment until that day passed." In *Mattison v. Marks* (31 Mich. 421), which was the case of a note payable "on or before" a day named, it was said: "True, the maker may pay sooner if he shall choose, but this option, if exercised, would be a payment in advance of the legal liability to pay, and nothing more. Notes like this are common in commercial transactions, and we are not aware that their negotiable quality is ever questioned in business dealings." (*Carlton v. Kenealy*, 12 M. & W. 139; *Colehan v. Willes*, Willes, 393; *Jordan v. Tate*, 19 Ohio St. 586; *Curtis v. Home*, 58 N. H. 504; *Howard v. Simkins*, 60 Georgia, 340; *Protection Ins. Co. v. Bill*, 31 Conn. 534, 538; *Goodloe v. Taylor*, 3 Hawks, 458; *Riker v. Sprague Mfg. Co.*, 14 R. I. 402.) In the last named case it was said that if the time of payment named in the note must certainly come, although the precise date may not be specified, it is sufficiently certain as to time. It was, consequently, held that a reservation in a note of the

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\* See *Clark v. Skeen*, 61 Kan. 526. — C.



right to pay it before maturity in instalments of not less than five per cent. of the principal at any time the semi-annual interest becomes payable, did not impair its negotiability; the court observing that a note is negotiable if one certain time of payment is fixed, although the option of another time of payment be given. In view of these authorities, as well as upon principle, we adjudge that the negotiability of the notes in suit was not affected by the provision that upon the failure of the maker to pay any one of the notes of the series to which those in suit belonged, the rest should become due and payable to the holder.

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(e) *Engagement to pay exchange.*<sup>1</sup>

§ 21

HASTINGS v. THOMPSON.

54 MINNESOTA, 184. — 1893.

ACTION by indorsee against maker to recover on promissory notes. Defendant answered setting up a good defense, unless they were negotiable and in the hands of a *bona fide* indorsee for value. Plaintiff demurred, and the sole question presented was, whether the insertion in the notes of the words, "*with current exchange on New York City*," rendered the notes non-negotiable and open to the defense. It was admitted that the plaintiff was a *bona fide* holder for value before maturity. The trial court overruled the demurrer and plaintiff appeals.

MITCHELL, J. — The only point raised on this appeal is whether the instruments sued on are promissory notes, for, if they are, they are unquestionably negotiable under the law merchant. They are promises to pay specified sums of money in St. Paul, "*with current exchange on New York City*;" and the only question is whether this provision as to exchange renders the sums required to discharge them uncertain, within the meaning of the familiar rule that one of the essential qualities of a promissory note is that the amount to be paid must be fixed and certain and not contingent. In the definitions of a promissory note or bill of exchange it is generally, if not always, stated that the amount necessary to discharge it must be ascertainable from the face of the paper itself, without having to refer to any extrinsic evidence. Construing this definition literally, it must be admitted that the instruments in question do not strictly fall within it, for, of course, extrinsic evidence must be resorted to in order to ascertain the rate of exchange at a given time between two places.

Upon examination of the reports and text-books it is surprising

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<sup>1</sup> See note in 125 Am. St. Rep. at p. 212. — C.

how little direct authority of any value is to be found as to the effect of the addition of such a provision to an instrument for the payment of money. Daniel, Randolph, and Tiedeman state in general that such a provision does not affect the commercial or negotiable character of the paper, but none of them discuss it at any length, and all of them treat of the question as if it only went to the negotiability of the instruments, whereas the real question lies back of that, and is whether they are promissory notes or bills of exchange at all. (*Tied. Com. Paper*, § 28*a*; *Rand. Com. Paper*, § 200; *Daniel, Neg. Inst.*, § 54.) We have found no English case directly in point, and none bearing on the question, except *Pollard v. Harries* (3 Bos. & P. 335), where such an instrument was declared on as a promissory note.

If the question was authoritatively settled in the leading commercial states of the Union or in the federal courts, we would be inclined, for the sake of uniformity, to follow their decisions; but we have been unable to find that the Supreme Court of the United States, or of either Massachusetts, New York, or Pennsylvania, has ever passed upon the question. The only cases, state, federal, or colonial, which we have found which may be considered as having passed on the question, are the following, which may be classified thus: That such instruments are not promissory notes: (*Lowe v. Bliss*, 24 Ill. 168; *Read v. McNulty*, 12 Rich. Law, 445; *Carroll Co. Sav. Bank v. Strother*, 28 S. C. 504, 6 S. E. Rep. 313; *Palmer v. Fahnestock*, 9 Up. Can. C. P. 172; *Saxton v. Stevenson*, 23 Up. Can. C. P. 503; *Philadelphia Bank v. Newkirk*, 2 Miles, 442; *New Windsor Bank v. Bynum*, 84 N. C. 24; *Russell v. Russell*, 1 MacAr. 263; *Fitzharris v. Leggatt*, 10 Mo. App. 527; *Hughitt v. Johnson*, 28 Fed. Rep. 865; *Windsor Sav. Bank v. McMahon*, 38 Fed. Rep. 283). That such instruments are promissory notes: (*Smith v. Kendall*, 9 Mich. 242; *Johnson v. Frisbie*, 15 Mich. 286; *Leggett v. Jones*, 10 Wis. 35; *Morgan v. Edwards*, 53 Wis. 599, (11 N. W. Rep. 21); *Bradley v. Lill*, 4 Bliss, 473). In very few of these cases is the question discussed at any length, or considered on principle. Some of them were decided by courts of inferior jurisdiction, and in others the remarks of the court were *obiter*. Many of those which hold that such instruments are not promissory notes rest, without discussion, upon a strict literal construction of the rule that the sum to be paid must appear from the face of the paper without resort to extrinsic evidence. About the only cases where the question is discussed at any length upon principle or authority are *Smith v. Kendall*, *Bradley v. Lill*, *Morgan v. Edwards*, and *Windsor Sav. Bank v. McMahon*, *supra*.

In view of this state of the decisions, while in mere numbers the decided weight of authority may be in favor of the contention of the defendant, we feel at liberty to decide the question in the way we deem most in accordance with principle and business usages, and

in accordance with the rule which, in view of such usages, the leading courts of the country are most likely to finally settle down upon. The following are, in brief the considerations which have led us to the conclusion that such instruments ought to be held to be promissory notes under the law merchant:

1. The reason and purpose of the rule that the sum to be paid must be certain is that the parties to the instrument may know the amount necessary to discharge it, without investigating facts not within the general knowledge of everyone, and which may be subject to more or less uncertainty, or more or less under the influence or control of one or other of the parties to the instrument. The provision for the payment of the current rate of exchange between the place of payment and some other place is not within the reason of this rule, or subject to the evils or inconveniences which it was designed to prevent. While the rate of exchange is not always the same, and while it is technically true that resort must be had to extrinsic evidence to ascertain what it is, yet the current rate of exchange between two places at a particular date is a matter of common commercial knowledge, or at least easily ascertainable by any one, so that the parties can always, without difficulty, ascertain the exact amount necessary to discharge the paper. It seems to us that within the spirit of the rule requiring precision in the amount to be paid a provision for the payment of the current rate of exchange in addition to the principal amount named does not introduce such an element of uncertainty as deprives the instrument of the essential qualities of a promissory note. A provision for the payment of exchange is very different from one for the payment of reasonable attorneys' fees in case of suit, as in *Jones v. Radatz* (27 Minn. 240, 6 N. W. Rep. 800). The latter introduces an element of uncertainty very different both in kind and degree from that introduced by the former. Not only is the amount of the attorneys' fees incapable of either easy or definite ascertainment, but the amount of it is more or less under the control of the holder of the instrument. Moreover, such a provision has never been considered in business circles as properly ancillary or incidental to commercial paper, or any part of its legitimate "luggage."

2. The law merchant, including the law of negotiable paper, is founded upon, and is the creature of, commercial usage and custom. Custom and usage have really made the law, and courts, in their decisions, merely declare it. The law of negotiable paper is not only founded on commercial usage, but is designed to be in aid of trade and commerce. Its rules should, therefore, be construed with reference to and in harmony with general business usages, and, as far as possible, with the common understanding in commercial circles. This was the very purpose of the statute of Anne placing promissory notes on the

same footing as bills of exchange, and thus setting at rest a question upon which there had been some difference of opinion in the courts. Now, we think we are safe in saying, and justified in taking notice of the fact, that if bankers or other business men accustomed to dealing in commercial paper were asked whether such an instrument is a promissory note, and whether they would deal with it as negotiable paper, the answers would, in almost every instance, be unhesitatingly in the affirmative. We have no doubt but that this is the way in which such paper is generally looked upon and treated in commercial and other business circles; and, if so, the courts should, as far as possible, make their decisions to conform to this general custom and understanding. We recognize the importance of simplicity and certainty in the terms and conditions of commercial paper; and appreciate the objections to permitting it to be loaded down with unnecessary "luggage," but we cannot see, under all the circumstances, and especially in view of what we believe to be the commercial usage, that any practical evil will result from permitting the addition of such a provision for the payment of current exchange on the principal amount. Nor are we disposed, as a rule, to extend the quality of negotiable paper to contracts for the payment of money beyond the strict limits of the already established rules of law; but to exclude from that category paper like that under consideration would be to exclude the very class of paper which ought to be held negotiable, if any promissory notes ought to be so held,—paper given and taken in commercial transactions, properly so called; for rarely, if ever, would a provision for exchange be incorporated in any other.

Order reversed.<sup>8</sup>

Application for re-argument denied July 20, 1893.

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<sup>8</sup> See other cases, pro and con, cited in *Haslach v. Wolf*, 66 Neb. 600, and in the note to this case in 1 A. & E. Ann. Cas. 385.

"The whole matter turns upon the question whether such a stipulation renders the amount uncertain, so as to destroy one of the essential elements of negotiability. While it is true that in a sense an uncertain element is imported into the instrument by the agreement to pay exchange, the difficulty is more specious than real. Business is carried on more or less in subordination to certain financial centres, to which and from which money is constantly flowing. When a note is made payable in Lincoln with Chicago exchange, the practical business effect is the same as if it had been payable in Chicago, but, for convenience, the parties had agreed that it might be paid at Lincoln, with the cost of transmission. . . . Looked at in this way, the exchange becomes a mere incident, not affecting the amount of the debt itself, and analogous to such matters as attorneys' fees and costs of collection, which do not affect negotiability." Pound, C., in *Haslach v. Wolf*, 66 Neb. 600, 601. — C.

(f) *Engagement to pay costs of collection or attorney's fees.*<sup>9</sup>

§ 21 STAPLETON v. LOUISVILLE BANKING CO.

95 GEORGIA, 802. — 1895.

SIMMONS, C. J. — The controlling question in this case is, whether a promissory note is rendered non-negotiable by a stipulation to pay "all costs and ten per cent. on amount for counsel fees, if placed in the hands of an attorney for suit." There is no prior decision of the court upon the question, and the decisions of other courts as to the effect of such stipulations are conflicting. We think the better view, and the one supported by the weight of authority, is that such a stipulation does not impair the negotiable character of the paper. Our code defines a promissory note to be "a written promise made by one or more to pay to another, or order, or bearer, at a specified time, a specific amount of money, or other articles of value." (§ 2774.) It is defined by Story to be "a written promise by one person to pay to another person therein named, or order, a fixed sum of money, at all events and at a specified time, or at a time which must certainly arrive." (*Story*, Prom. Notes, p. 2). The note in question conforms to all these requirements. It is certain as to the payee, as to the time of payment, and as to the amount. The stipulation as to costs and attorney's fees is not a part of the main engagement, but relates to the remedy in case of failure to comply with the contract, and is intended to compensate for the expense resulting from its breach. It does not become effective unless there is a failure to pay at the time specified; and it cannot then affect its negotiability, for negotiability in the full commercial sense ceases at maturity. As has been well said by Mr. Daniel in his work on Neg. Instruments (vol. 1, § 62a, 4th ed.), "it seems paradoxical to hold that instruments evidently framed as bills and notes are not negotiable during their currency, because when they cease to be current they contain a stipulation to defray the expenses of collection." So far from tending to check the circulation of the paper, such a provision adds to its value and thus renders it more available for commercial purposes. In support of these views, see the following authorities: (1 *Daniel*, Neg. Inst., 4th ed. § 62 *et seq.*; 1 *Randolph*, Com. Paper, §§ 205, 206; *Parsons*, Bills and Notes, 146, 147; *Tiedeman*, Com. Pap., § 28b; 2 *Am. & Eng. Enc. of Law*, 324; *Montgomery v. Crossthwait*, 90 Ala. 553; *Farmers' Nat. Bank v. Sutton Mfg. Co.*, 6 U. S. Appeals, 312, 331; *Shenandoah Nat. Bank v. Marsh*, 89 Iowa, 273; *Second Nat. Bank v. Anglin*, 6 Wash. 403; *Dorsey v. Wolff*, 142 Ill. 589, affirming 38 Ill. App. 305; *Stoneman v. Pyle*, 35 Ind. 103; *Proctor v. Baldwin*, 82 Ind. 370; *Gaar v. Louisville Banking*

<sup>9</sup> See note in 125 Am. St. Rep. at p. 207. — C.

*Co.*, 11 Bush (Ky.), 180; *Seton v. Scovill*, 18 Kans. 433; *Nickerson v. Sheldon*, 33 Ill. 373; *Dietrich v. Bayhi*, 23 La. Ann. 767; *Trader v. Chidester*, 41 Ark. 242; *Farmers' Nat. Bank v. Rasmussen*, 1 Dak. 60; *Heard v. Dubuque Bank*, 8 Neb. 10; *Howenstein v. Barnes*, 5 Dillon, 482; *Bank of Commerce v. Fuqua*, 11 Montana, 285. See also *Towne v. Rice*, 122 Mass. 67; *Arnold v. Rock River Valley R. Co.*, 5 Duer, 207; *Adams v. Addington*, 16 Fed. Rep. 89; *Hughitt v. Johnson*, 28 Fed. Rep. 865.<sup>1</sup>

It was complained that the court erred in directing the jury to find in favor of the plaintiff the amount of attorney's fees stipulated in the note, in addition to the principal and interest, the objection being that there was no evidence to show that the note had ever been placed in an attorney's hands for collection. We think the fact that the plaintiff was represented in this action by an attorney was sufficient, without further evidence, to authorize the court to so instruct the jury. (See *No. Atchison Bank v. Gay*, 114 Mo. 203.)

Judgment affirmed.

## § 21

## MAYNARD v. MIER.

85 INDIANA, 317. — 1882.

Woods, C. J. — Appeal from a judgment on a promissory note, a copy of which was filed with the complaint. It contains a promise in the ordinary form, to pay a sum named, "with interest at the

<sup>1</sup> Contra: *First Nat. Bk. v. Babcock*, 94 Cal. 96; *Maryland Fertilizing Co. v. Newman*, 60 Md. 584; *Altman v. Rittershofer*, 68 Mich. 287; *Jones v. Radatz*, 27 Minn. 240; *McCoy v. Green*, 83 Mo. 626; *Decorah First Nat. Bk. v. Laughlin*, 4 N. Dak. 391; *Woods v. North*, 84 Pa. St. 407; *Stillwater First Nat. Bk. v. Larsen*, 60 Wis. 206. — H.

[See note in 4 A. & E. Ann. Cas. 263, entitled "Negotiability of note containing stipulation for attorney's fees and costs of collection," giving a large number of authorities pro and con.

In *First Nat. Bank v. Miller*, 139 Wis. 126, MARSHALL, J., said that the Negotiable Instruments Law "was considerably designed to supersede the judicial rule in *Morgan v. Edwards*, 53 Wis. 599; *First Nat. Bk. v. Larsen*, 60 Wis. 206; *Peterson v. Stoughton St. Bk.*, 78 Wis. 113; *W. W. Kimball Co. v. Mellen*, 80 Wis. 133, and similar cases. . . . When the Negotiable Instruments Law was enacted a conflict of judicial authority on the subject in hand and others existed. In some states a clause similar to that here was held to render the amount payable on the instrument uncertain and to destroy its negotiability. In many other states the obligation as to costs of collection was held to be contingent upon collection after dishonor, to appertain to the remedy for a breach of the primary contract, not to the debt itself, and, therefore, not to render the amount uncertain, militating against negotiability. To supersede the conflict by a general rule the provision of the Negotiable Instruments statute quoted was incorporated therein." P. 127. — C.]

rate of ten per cent., after maturity, and ten per cent. attorney's fees."

It is claimed that the court erred in overruling the defendants' demurrer to the complaint. The entire argument on the point is in these words: "The complaint is not sufficient in this, it is not definite and certain, and the copy of the note shows that the agreement (is) to pay ten per cent. attorney's fees, which we insist is void, and that, therefore, the note is usurious as to that amount, and should be held void, and the judgment reversed."

If the stipulation for attorney's fees were conceded to be void the validity of the note would not be otherwise affected, and consequently the demurrer was properly overruled.

Judgment affirmed, with costs.<sup>2</sup>

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<sup>2</sup> There are three views as to the validity of the stipulation as to attorney's fees: (1) The stipulation is valid. *Bowie v. Hall*, 69 Md. 433; *Dorsey v. Wolff*, 142 Ill. 589. (2) The stipulation is void. *Bullock v. Taylor*, 39 Mich. 137; *Rixey v. Pearre*, 89 Va. 113; *Security Co. v. Eyer*, 36 Neb. 507; *Witherspoon v. Musselman*, 14 Bush (Ky.), 214. (3) The stipulation to pay such fees as the court adjudges reasonable, is valid, but a stipulation for a specific sum is void. *Levens v. Briggs*, 21 Ore. 333. Most courts hold that the amount stipulated is not conclusive, but there must be proof of the actual value of the services. *First Nat. Bank v. Larson*, 60 Wis. 206; *Goss v. Bowen*, 104 Ind. 207.

There are four distinct holdings as to the result upon the negotiability of a bill or note of the insertion of a stipulation as to payment of attorney's fees: (1) The stipulation is valid and enforceable, and does not affect the negotiability of the instrument. *Dorsey v. Wolff*, 142 Ill. 589. (2) The stipulation is valid and enforceable, but it destroys the negotiability of the instrument. *Jones v. Radatz*, 27 Minn. 240; *Johnston Harvester Co. v. Clark*, 30 Minn. 308; *First Nat. Bk. v. Larsen*, 60 Wis. 206. (3) The stipulation is void, and as it may therefore be disregarded, it does not affect the negotiability of the instrument. *Gilmore v. Hirst*, 56 Kans. 626; *Chandler v. Kennedy*, 8 S. Dak. 56. (4) The stipulation is void, but nevertheless it destroys the negotiability of the instrument. *Bullock v. Taylor*, 39 Mich. 137; *Altman v. Rittershofer*, 68 Mich. 287; *Tinsley v. Hoskins*, 111 N. C. 340; *New Windsor First Nat. Bk. v. Bynum*, 84 N. C. 24. It is difficult to support this view upon principle.—H.

[A note contained a provision to pay "ten per centum attorney's fees in case of collection by suit." Held, the note was negotiable but the provision unenforceable as being a penalty. *Fields v. Fields*, 105 Va. 714, citing *Rixey v. Pearre Bros. and Co.*, 89 Va. 113.]

In *Elmore v. Rugely*, 107 S. W. (Tex. Ct. Civ. App.) 151, it was held that such a provision is a contract of indemnity and not for liquidated damages, so that the maker is only liable to the holder for the amount of attorney's fees actually contracted for, or, in the absence of a special contract for fees, for the reasonable value of the services rendered.

In a note to the *Fields* case in 7 Col. Law Rev. 67, it is said: "The two grounds for holding the stipulation invalid are usury and penalty. . . . The N. Y. Negotiable Instruments Law, while declaring that such a note is negotiable, § 21, is silent as to the validity of such a stipulation."—C.]

5. MUST BE PAYABLE IN MONEY; BUT PARTICULAR KIND MAY BE DESIGNATED.

(a) *Payment must be in money.*

§ 20 FIRST NATIONAL BANK OF BROOKLYN *v.* SLETTE.

67 MINNESOTA, 425. — 1897.

ACTION on an instrument set out in the opinion. Verdict for plaintiff. From an order denying a new trial, defendants appeal.

START, C. J. — This action is based upon an obligation, which is substantially in these words:

\$1,673.

HALSTAD, MINN., July 26, 1894.

For value received, we promise to pay to the order of the John Good Cordage and Machine Company the sum of sixteen hundred and seventy-three dollars, as follows: Payable by New York or Chicago exchange, \$560, Nov. 15th, 1894; \$560, Dec. 1st, 1894; \$560, Dec. 15th, 1894. Without interest, if paid as due; if not, then legal rate from date until paid.

The only question on this appeal is whether this is a negotiable instrument under the law merchant. It is absolutely essential, in order to constitute a promissory note under the law merchant, that the promise be to pay in money. If this instrument can be construed as an absolute promise to pay in money \$1,673, with exchange, it is negotiable; otherwise, not. (*Hastings v. Thompson*, 54 Minn. 184, 55 N. W. 968.) The case of *Bradley v. Lill* (4 Biss. 473, Fed. Cas. No. 1,783), is the only one to which our attention has been called, where the language of the instrument was similar to the one under consideration. In the case referred to the note was made in Chicago, and was payable at New York, "in" exchange; and it was held that the note was negotiable, upon the ground that the promise was to pay the sum named in the note, "with" exchange, which was a mere incident to the debt. In the case at bar the note is not payable at any particular place, and the promise is, not to pay a given number of dollars in money "with" — that is, plus — the current rate of exchange, but it is to pay the sum named in the note by New York or Chicago exchange. The holder of this instrument cannot demand in payment thereof \$1,673 in money, plus the cost of exchange; for the maker is not bound to discharge his obligation except by means of inland bills on New York or Chicago. Nor can the maker tender in payment \$1,673 in money, with the cost of exchange; for his promise is to make payment by inland bills, which he must purchase in the market. The instrument, then, is not payable in money, and is, therefore, not a promissory note, within the law merchant. (*Easton v. Hyde*, 13 Minn. 90 (Gil. 83); *Jones v. Fales*, 4 Mass. 245; *Irvine v. Lowry*, 14 Pet. 293; 1 *Daniel*, Neg. Inst., §§ 55, 56; *Tied. Com. Paper*, § 29; 1 *Rand. Com. Paper*, § 90).



In reaching this conclusion we have not been unmindful of the fact that, in commercial usage, bills of exchange are regarded as substitutes for money; but this usage cannot make them such.

Order reversed, and a new trial granted.<sup>3</sup>

(b) *What constitutes current money.*<sup>4</sup>

§ 25

LAIRD v. STATE.

61 MARYLAND, 309. — 1883.

ROBINSON, J., delivered the opinion of the Court

The plaintiff in error was indicted for forging and uttering a *bill of exchange*, which is set out in the indictment as follows:

STAUNTON, VA., September 4, 1882.

Augusta National Bank, pay to J. Edwin Laird or bearer, the sum of seventy-five dollars (\$75) current funds.

G. G. GOOCH.

Correct, W. P. TARNs, *Cashier*.

[And endorsed] J. EDWIN LAIRD.

A demurrer was filed to the indictment, which was overruled, and the prisoner was tried before the court and found guilty.

Motions for new trial, and to quash the indictment were made, and both overruled, and the prisoner was sentenced to the penitentiary for five years. The record comes before us on petition setting forth the points and questions, by the decision of which the plaintiff in error feels aggrieved. \* \* \*

In the next place it is argued, that the paper writing set forth in the indictment, is not a bill of exchange because it is payable "in *current funds*." Bills of exchange pass by delivery or indorsement, and it is essential that the instrument purporting to be one, should be payable in money. A direction to pay out of *certain funds*, or *notes of a particular bank*, or *the currency of a particular place or state*, have been held to destroy its negotiability, because the medium of payment is fluctuating and uncertain. The many and conflicting decisions on this subject, will be found collected in 1 *Daniel on Neg. Inst.*, secs. 61-3, and *note*. All the cases, however, agree, if the in-

<sup>3</sup> "A B has deposited in this bank \$2,180 in cks., payable to the order of himself, on the return of this certificate properly indorsed," is not negotiable because it does not appear that the bank promises to pay in money. — *First National Bank of Farmersville v. Greenville National Bank*, 84 Tex. 40. An order "to pay rents as they become due" is not a bill of exchange because (1) it is payable out of a particular fund, and (2) it is not payable in money on its face. "It is to pay rents, which may be due in wheat, fowls, or services, as well as money." — *Morton v. Naylor*, 1 Hill (N. Y.), 583 (1841). — H.

<sup>4</sup> See Neg. Inst. L., § 25, subsect. 5. — H.

[See note in 125 Am. St. Rep. at p. 197. — C.]

strument be payable in current money, it is sufficient, because legal tender money will be presumed to be intended. The words "current funds," as used in the paper before us, mean nothing more or less than "current money," and so construed the instrument was negotiable. \* \* \*

Judgment affirmed.

## § 25 MR. JUSTICE FIELD IN *BULL v. BANK OF KASSON*.

123 UNITED STATES, 105, 112. — 1887.

THE certificate of division of opinion presents to us only one question, and yet, to answer that correctly, we must consider whether the negotiability of the instruments in suit was affected by the fact that they were payable "in current funds." Undoubtedly it is the law, that to be negotiable, a bill, promissory note or check, must be payable in money, or whatever is current as such by the law of the country where the instrument is drawn or payable. There are numerous cases where a designation of the payment of such instruments in notes of particular banks or associations, or in paper not current as money, has been held to destroy their negotiability. (*Irvine v. Lowry*, 14 Pet. 293; *Miller v. Austen*, 13 How. 218, 228). But within a few years, commencing with the first issue in this country of notes declared to have the quality of legal tender, it has been a common practice of drawers of bills of exchange or checks, or makers of promissory notes, to indicate whether the same are to be paid in gold or silver, or in such notes; and the term "current funds" has been used to designate any of these, all being current and declared, by positive enactment, to be legal tender. It was intended to cover whatever was receivable and current by law as money, whether in the form of notes or coin. Thus construed, we do not think the negotiability of the paper in question was impaired by the insertion of these words.<sup>5</sup>

<sup>5</sup> **CURRENT FUNDS.** — In the following cases "current funds" was held the equivalent of "money:" *Lacy v. Holbrook*, 4 Ala. 88; *Phoenix Ins. Co. v. Allen*, 11 Mich. 501; s. c., 13 Mich. 191; *White v. Richmond*, 16 Oh. 6; *Citizens' Nat. Bk. v. Brown*, 45 Oh. St. 39; *Telford v. Patton*, 144 Ill. 611. In the following cases "current funds" was held not the equivalent of "money:" *Lafayette Bank v. Ringel*, 51 Ind. 393; *Johnson v. Henderson*, 76 N. Car. 227; *Wright v. Hart*, 44 Pa. St. 454; *Texas Land, etc., Co. v. Carroll*, 63 Tex. 48; *Platt v. Sauk Co. Bank*, 17 Wis. 230.

**CURRENCY.** In the following cases "currency" was held the equivalent of money: *Swift v. Whitney*, 20 Ill. 144; *Phelps v. Town*, 14 Mich. 374; *Mitchell v. Hewitt*, 13 Miss. 361; *Dugan v. Campbell*, 1 Oh. 115; *Howe v. Hartness*, 11 Oh. St. 449; *Butler v. Paine*, 8 Minn. 324; *Frank v. Wessels*, 64 N. Y. 155 ("paper currency," when there is a legal tender paper currency); *Klauber v. Biggerstaff*, 47 Wis. 551; *Wright v. Morgan* (Tex.), 37 S. W. 627. In the fol-

## § 25

## MILLER, J., IN PARDEE v. FISH.

60 NEW YORK, 265. — 1875.

IT IS further urged that the instrument in question is not commercial paper for the reason that it is made payable in current bank notes instead of money. The authorities in this state, I think, are adverse to this position. In *Keith v. Jones* (9 Johns. 120), the note upon which the action was brought was declared to be payable in "York State bills or specie," and it was said that it "is the same thing as being made payable in lawful current money of the state, for the bills mentioned mean bank paper, which is here in conformity with common usage and common understanding regarded as cash." In *Judah v. Harris* (19 Johns. 144), a promissory note payable "in bank notes current in the city of New York," was held to be a negotiable note within the statute. It is said that these decisions were placed upon the ground that the court could take judicial notice that such bills are equivalent to specie. The same rule may well apply here, as "current bank notes" are notes or bills used in general circulation as money, and constituted the general currency of the country recognized by law at the time and place where payment was to be made and demanded. These notes which were in circulation when the certificate was given and payment demanded, were almost entirely of one kind authorized by the government as currency. They thus being lawful money of the United States, the courts were bound to take judicial notice of that fact. The cases of *Lieber v. Goodrich* (5 Cow. 186), and *Thompson v. Sloan* (23 Wend. 77), are not in conflict with *Heath v. Jones* and *Judah v. Harris* (*supra*). Although the doctrine of the latter was doubted in 3 Kent's Commentaries, pp. 75-76, and in some of the state courts it is held that a note payable in current funds is not negotiable, it is safe to follow the adjudications in this state as settling the law upon the subject. Even although a demand was necessary upon the bank

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lowing cases "currency" was held not the equivalent of "money:" *Mobile Bank v. Brown*, 42 Ala. 108; *Dillard v. Evans*, 4 Ark. 175; *Rindskoff v. Barrett*, 11 Iowa, 172; *Huse v. Hamblin*, 29 Iowa, 501; *Chambers v. George*, 5 Litt. (Ky.) 335; (otherwise of "Kentucky currency," *Lampton v. Haggard*, 3 Monr. (Ky.) 149); *Farwell v. Kennett*, 7 Mo. 595; *Hicklin v. Tucker*, 2 Yerg. (Tenn.) 448; *Ford v. Mitchell*, 15 Wis. 334. — H.

[“We are aware that many courts have held that such a clause [payable ‘in current funds’] does not require payment in money, and destroys the negotiability of the instrument. The cases so holding are either cases arising at a time when many forms of bank notes and bills were in use, varying in their values, or cases decided upon the authority of that class without regard to changed conditions. With regard to existing conditions, we think the Supreme Court of the United States has declared the law correctly in *Bull v. Bank of Kasson*.” IRVINE, C., in *Kirkwood v. First Nat. Bank*, 40 Neb. 484, at p. 492. — C.]

before an action could be brought against it on the instrument, thus distinguishing the case from that of a promissory note, where the maker may be sued without any demand, I do not think that this fact takes away the negotiable character of the instrument under the decisions cited, and it must, therefore, be considered as possessing all the features of a negotiable promissory note.<sup>6</sup>

## § 25

## CHRYSLER v. RENOIS.

43 NEW YORK, 209. — 1870.

ACTION by indorsee on a draft for 1,205 gold dollars. Judgment for plaintiff.

ALLEN, J. — [After disposing of another matter]. The bill in suit was drawn in Montreal on a business firm at Whitehall in this state, payable in New York in dollars, the money of account of the state, and in gold dollars, a coin authorized by Congress, and made a legal tender in the payment of debt. It was, therefore, negotiable as a bill of exchange. (1 R. S., 611, § 1; 9 U. S. Stat. at Large, 397.)

It is enough that it is for the payment of money and money only, in cash and not something that may differ in value from cash. (*Leiber v. Goodrich*, 5 Cow. 186.) It is agreed that bills payable in merchandise or anything but money are not good bills of exchange, but the cases are not agreed in all respects as to what shall be deemed money. In this state it is held that a promissory note, payable "in bank notes current in the city of New York" or "in New York state bills or specie," are negotiable notes within the statutes (*Keith v. Jones*, 9 Johns, 120; *Judah v. Harris*, 19 Johns. 144), while a note payable "in Canada money" is not a negotiable note. (*Thompson v. Sloan*, 23 Wend. 71.) The first cases were decided upon the ground that the court might take judicial notice that bank notes, current in the city of New York, were customarily considered and

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<sup>6</sup> BANK NOTES. The following were held equivalent to "money:" "The bank notes current in the city of New York." *Judah v. Harris*, 19 Johns. (N. Y.) 144. "Current bank notes." *Pardee v. Fish*, *supra*; *Fleming v. Nall*, 1 Tex. 246. "Current bank notes of Cincinnati." *Morris v. Edwards*, 1 Oh. 189; *Sweetland v. Creigh*, 15 Oh. 118.

The following were held not equivalent to "money." "Current bank paper." *Campbell v. Weister*, 1 Litt. (Ky.) 30. "Notes receivable in bank." *Breckinridge v. Ralls*, 4 Monr. (Ky.) 533. "Current notes of North Carolina." *Warren v. Brown*, 64 N. Car. 381. "Current bank notes." *Gray v. Donahoe*, 4 Watts. (Pa.) 400; *Gamble v. Hatton*, Peck (Tenn.), 130; *Kirkpatrick v. McCullough*, 3 Humph. (Tenn.) 171; *McDowell v. Keller*, 4 Coldw. (Tenn.) 258. "Current bills." *Collins v. Lincoln*, 11 Vt. 268. — H.

[See note in 4 A. & E. Ann. Cas. at p. 632 on "negotiability of note payable in bank notes." — C.]

treated as equivalent to money, which could not be predicated of a note payable in Canada money. Coin current in Canada might not be current in this state, and foreign bills are not regarded as money. (*Jones v. Fales*, 4 Mass. 245.) In other states a different rule prevails; and bills payable in bank bills, even of the state where payable, are held not negotiable. (*McCormick v. Trotter*, 10 Serg. & R. 94.) In this action the bill is for 1,205 gold dollars, that is \$1,205 in gold coin, and, as is claimed, in coin of a particular denomination; but it is nevertheless, payable in a coin known and recognized as a part of the currency of the country, coined by authority of Congress and made receivable in all payments (9 Stat. at Large, 397). If the bill had called for \$1,205 without specifying the coin or currency it would have been payable in any lawful currency, and the acceptors might have discharged their obligations by tendering payment in "gold dollars." The tender would have been in money; but if "gold dollars" are but an article of merchandize, a commercial commodity, as claimed, a tender of these in satisfaction of an obligation for the payment of money would not be good, and a debtor could not by such tender relieve himself from his obligation. The laws have not been repealed which declare the money value of the gold and silver coin of the United States and make them a legal tender in the payment of debts. The bill has all the qualities of a negotiable bill of exchange; it is payable absolutely; and in money, and not out of a particular fund.

There are two descriptions of lawful money in use under acts of Congress (assuming the validity of the "legal tender" acts, so called, as applicable to any contract calling for money), and it does not destroy the negotiability of commercial paper or change its character, that it is in terms made payable in any description of money that is recognized and known as money current in business, and which is made a legal tender in payment of debts. (*Butler v. Horwitz*, 7 Wall. 258; *Bronson v. Rodes*, 7 Wall. 229.) Bills of exchange are favored as valuable instruments in commerce, and merchants must be permitted to make them payable in any money lawful and current in the place where payable; and if more than one description of money is recognized by the law of the place, to select that which is most convenient to the parties, without changing the character and legal incidents of the instruments and destroying their negotiability.

But the referee has found, as a question of fact, that the contents of the said bill of exchange or draft were expressed in the money of account and currency of the province of Canada, and has awarded damages for non-payment upon that theory, that is, has given judgment for the value of the amount called for in Canada coin in Montreal on the day the bill matured. In this the referee erred. The contract, interpreted by the law of the place where payable,

called for payment in money there current and the construction of the contract was one of law not of fact.

The error of the referee was carried into the judgment in the assessment of the damages.

Upon this construction of the contract, and an allegation in the complaint, that the value in New York of a draft on Montreal for \$1,205 was at the time of the default in payment, \$1,831.60, not denied by the answer, the referee reported in favor of the plaintiff for that amount, with interest to the date of the report, and the plaintiff had judgment accordingly. The plaintiff was entitled to a judgment following the contract, and payable in coin for the amount to which the law entitled him upon the dishonor of the bill. That was the sum specified in the bill, with interest thereon, at the rate allowed by law.

There is no warrant for an allowance of damages for the non-payment of money beyond the interest given by statute, neither can the courts compel a party, who has stipulated for the receipt of money in coin, to accept of an equivalent in depreciated currency. So long as the inferior currency, which is excluded from the operation of the contract, and cannot be paid, or tendered in satisfaction, fluctuates in value, absolute justice cannot be done to the parties by adjudging payment in the depreciated currency of a debt due in coin, with an addition for the difference in value.

The only way in which effect can be given to the contract, is by a judgment in terms payable in the better currency to which the creditor is entitled, and an execution following the judgment, and so long as the law recognizes the two currencies of different values, judgments upon contracts for the payment in the better currency, must of necessity, be given in this form, or the distinction between the two kinds of money as affecting the rights of parties, vanishes when the contract is merged in the judgment, and the rights of a creditor under a contract for payment in coin are of no value. This form of judgment is sanctioned by precedent, and has the warrant of the Supreme Court of the United States. (*Bronson v. Rodes*, 7 Wall. 229; *Cheanykee v. United States*, 3 Id. 320.)

The judgment must be modified, and reduced to the amount to which the plaintiff was entitled, payable in coin, with costs of the court below, payable in currency, without costs to either party upon the appeal.

All the judges concurring, judgment modified in accordance with the opinion of Allen, J.

## § 25

## HOGUE v. WILLIAMSON.

85 TEXAS, 553. — 1893.

GAINES, ASSOCIATE JUSTICE. — This is a question certified to us for determination by the Court of Civil Appeals for the Third Supreme Judicial District. The certificate is as follows:

“The plaintiff, Hogue, brought suit against defendant, Williamson, upon a written obligation, which reads as follows:

SALTILLO, *January 25*, 1888.

On or before May 1, 1888, I promise to pay C. C. Hogue, or order, one thousand Mexican silver dollars.

\$1,000, Mex.

GEO. S. WILLIAMSON.

The petition alleges that on May 1, 1888, Mexican dollars were each worth 85 cents in ‘American’ coin, and plaintiff asks judgment for \$850. He states in his petition that the note is payable in Mexican silver dollars.

The defendant filed a general denial, and also averred in his answer, under oath, that the note sued on was given for money which the plaintiff had won from defendant in a game of cards, and was therefore illegal and void.

Upon the trial in the court below, the plaintiff put in evidence the written obligation sued on, and proved that on May 1, 1888, Mexican silver dollars were worth 80 cents each. The plaintiff then rested and the defendant introduced no testimony.

The court instructed the jury to return a verdict for defendant, which was done, and judgment entered accordingly.

If the instrument sued on was a promissory note, this is in error. (*Newton v. Newton*, 77 Texas, 511.)

With this explanation, the Court of Civil Appeals for the Third Supreme Judicial District certifies and submits to the Supreme Court, for decision as a part of the law of this case, as a new or novel question, the following proposition:

Was the burden of proof on the plaintiff, after the introduction of the instrument sued on, to show non-performance of its obligations by defendant? In other words, is the written obligation sued on a promissory note, obligating its maker to pay a certain sum of money; or is it an ordinary contract for the delivery of a certain commodity; and must the plaintiff, by affirmative testimony, show a breach of the contract?”

We are of the opinion that the instrument in question is a promissory note. It is such in form and substance, unless the fact that the sum payable is expressed in Mexican silver dollars should make a difference. Speaking of the sum for which a bill of exchange must be drawn, Mr. Chitty says: “It may be the money of any country.” (*Chitty on Bills*, 160). Judge Story says: “But provided the note be for the payment of money only, it is wholly immaterial in the currency or money of what country it may be payable. It may be payable

in the money or currency of England, or France, or Spain, or Holland, or Italy, or any other country. It may be payable in coins, such as pounds sterling, livres, tomnosis, francs, florins, etc., for in all these and the like cases the sum of money to be paid is fixed by the par of exchange, or the known denomination of the currency with reference to the par." (*Story on Prom. Notes*, § 17.) The same rule is distinctly laid down in 1 *Daniel* on Neg. Inst., § 58, and in *Tiedeman* on Com. Paper, § 29b. In view of the opinion of these eminent text-writers, it is remarkable that we have found but two cases in which the question is discussed or decided.

In *Black v. Ward* (27 Mich. 191), it is held, that a note made in Michigan, payable in Canada in "Canada currency," is payable in money, and is therefore negotiable. But in *Thompson v. Sloan* (23 Wendell, 71), a note made in New York and payable there in "Canada currency" was held not negotiable. The court, however, say; "This view of the case is not incompatible with a bill or note payable in money of a foreign denomination, or any other denomination, being negotiable, for it can be paid in our own coin of equivalent value, to which it is always reduced by a recovery. A note payable in pounds, shillings, and pence, made in any country, is but another mode of expressing the amount in dollars and cents, and is so understood judicially. The course therefore in an action on such instrument is to aver and prove the value of the sum expressed in our own tenderable coin."

This decision was made in 1840, and it is to be inferred that at that time the dollar was not a denomination of the lawful money of Canada. We also infer, that when the Michigan case arose, this had been changed and the denomination of Canada money corresponded with that of the United States. Upon this theory, it would seem that the cases may be reconciled. The language quoted from the opinion in *Thompson v. Sloan*, *supra*, indicates clearly, that if the money named in the note had been the denomination of Canada money, the ruling would have been different, unless, perchance, the word "currency" would have affected the question. The note we have under consideration is for Mexican silver dollars — coins recognized by the laws of the United States as money of the Republic of Mexico. (U. S. Rev. Stats., § 3567.)

We conclude that the note sued upon in this case was a negotiable promissory note, and that when the plaintiff offered it in evidence, and proved the value of the Mexican dollar at the time of its maturity, he had made a *prima facie* case, and our opinion will be certified accordingly.<sup>7</sup>

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<sup>7</sup> A note payable in New Brunswick in "U. S. currency" is negotiable. "It is not necessary that the money payable by a note should be current in the place of payment or where the bill is drawn; it may be in the money of any



# 6. MUST NOT CONTAIN AN ORDER OR PROMISE TO DO ANY ACT IN ADDITION TO PAYMENT OF MONEY.

## (a) *Effect of additional stipulations.*

### § 24

### DAVIES *v.* WILKINSON.

10 ADOLPHUS & ELLIS (Q. B.) 98. — 1839.

On the trial the plaintiff gave in evidence the following document:

"I agree to pay to Mr. Charles Davies, or his order, the sum of 695*l.*, at four instalments, viz., the first instalment to be paid on Monday next, June 10th, 1833, being 200*l.*; the second on the settling day at Doncaster after the St. Leger, being 150*l.*; the third on the settling day at Doncaster, after Epsom, 1834, being 150*l.*; and the fourth on the settling day at Doncaster, after the St. Leger, 1834, being 100*l.*; the remainder, 95*l.*, to go as a set-off for an order of Mr. Reynolds to Mr. Thompson, and the remainder of his debt owing from C. Davies to him. (Signed) JAMES WILKINSON."

The defendant's counsel objected that the instrument was a promissory note, and should have been stamped accordingly.

LORD DENMAN, C. J. — The first objection is, that this instrument was improperly received in evidence, being a promissory note not duly stamped. It is a note, up to a certain point but it ends, "95*l.* to go as a set-off for an order of Mr. Reynolds to Mr. Thompson, and the remainder of his debt owing from C. Davies to him." I think that takes from it the character of a promissory note, and makes it an agreement, and that it was properly received.<sup>8</sup>

country whatever. . . . And may it not be assumed that 'United States currency' means the money of the United States, and that the note is for the payment of three hundred and seventy-one dollars of the United States. [Citing statute recognizing United States coinage.] This is a legislative recognition that the eagle of the United States and the divisions thereof are coins; or, in other words, the currency of that country." — *St. Stephen Branch Ry. Co. v. Black*, 2 Hanney (N. B.), 139 (1870). — H.

["A note payable in pounds sterling or British sovereigns is payable in 'money' just as much and as certainly as if it was payable in dollars. The case is different from a note payable in 'currency,' which may be 'money' only conventionally, but not legally. But where a note is made payable in a particular denomination of foreign money, as pounds sterling, it is payable in money the same as if it was payable in a denomination of domestic money." DEADY, D. J., in *King v. Hamilton*, 12 Fed. Rep. 478, 479. — C.]

<sup>8</sup> An order directing the drawee to pay \$400, and take up the drawer's note given to A B, is not a bill. "The essential qualities of a bill or note are (1) that it be payable at all events; not dependent on any contingency, nor payable out of any particular fund; and (2) that it be for the payment of money only, and not for the performance of some other act, or in the alternative." — *Cook v. Satterlee*, 6 Cow. (N. Y.) 108. Accord: *Killam v. Schoeps*, 26 Kans. 310; *Bunker v. Athearn*, 35 Me. 364. — H.

## § 24

## LEONARD v. MASON.

1 WENDELL (N. Y.) 522. — 1828.

ERROR from the Onondaga Common Pleas. A. Leonard sued Mason in a Justice's Court, on an order for the payment of money accepted by Mason. The plaintiff held a promissory note against one N. Leonard for \$34.48, underneath which was written an order or bill of exchange, in these words: "Levi Mason, Esq., please pay the above note, and hold it against me in our settlement. N. Leonard." The justice gave judgment for the defendant, and the plaintiff appealed to the Onondaga Common Pleas. On the trial in that court, the note, with the order written thereunder, were produced, and a presentment to, and a parol acceptance and promise to pay by, the drawee proved. The Common Pleas nonsuited the plaintiff, holding the promise of the defendant to be within the statute of frauds.

*By the Court*, SAVAGE, CH. J. — The only question is, whether the order which the defendant accepted is a good bill of exchange: if so, a parol acceptance is good.<sup>9</sup> It is supposed that this case depends on the same principles as the case of *Cooke v. Satterlee & Satterlee* (6 Cowen, 108). The rule there recognized is, that a bill of exchange must be for the payment of money, and nothing else. In that case, the drawees were required to pay a certain sum of money, and take up a note given by the drawer to a third person. Here it is to pay a note, which is referred to merely to ascertain the amount; and the retaining the note as a voucher is no more the performance of another act beside the payment of the money than the retaining the order itself for the same purpose.

The court erred. The judgment must be reversed, and a *venire de novo* is awarded to Onondaga Common Pleas.

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(b) *Exceptions: (1) Authorizing sale of collateral.*

## § 24

## VALLEY NATIONAL BANK v. CROWELL.

148 PENNSYLVANIA STATE, 284. — 1892.

ACTIONS on promissory notes.

The defense set up by the affidavit was that there was no technical liability as indorsers on the part of defendants, because of the non-negotiability of the notes sued on. These notes contained, in addition to the ordinary form of note, the clause which is quoted in the opinion of the Supreme Court.

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<sup>9</sup> But see Negotiable Instruments Law, § 220. — H.

The court below, Sadler, P. J., of the Ninth judicial district, specially presiding, made the rules absolute in both cases, and defendants appealed.

Errors assigned were making the rule absolute and entering judgment.

PER CURIAM, Mar. 28, 1892:

The only question in this case was whether the note in controversy was negotiable. It is in the usual form of negotiable paper, but it is contended that its negotiability is destroyed by reason of the following provision contained therein:

"Having deposited herewith a like amount of Crowell Company mortgage bonds as collateral security, which we authorize the holder of this note, upon the non-performance of this promise at maturity, to sell either at the broker's board, or at public or private sale, without demanding payment of this note or the debt due thereon, and without further notice, and apply proceeds, or as much thereof as may be necessary, to the payment of this note and all necessary charges, holding us, as makers and indorsers, responsible for any deficiency."

We find nothing in this to destroy the negotiability of the note. While it has been truly said that a promissory note is a courier without luggage, we find nothing in the language quoted beyond the statement that the note is accompanied with certain collateral. The mere giving of collateral security with a promissory note does not destroy its negotiability. (*Arnold v. Rock River Valley Union R. R.*, 5 Duer, 382; *Towne v. Rice*, 122 Mass. 67.) In *Woods v. North* (84 Pa. 407); *Johnston v. Speer* (92 Pa. 227), the amount of the note was held to be uncertain. In *Bank v. Poillet* (126 Pa. 195), the court refused to hold the indorser liable, because the time of payment was not fixed, and in *Bank v. McCord* (139 Pa. 52), the payment was made dependent upon certain conditions. In the case in hand, the amount of the note is not uncertain, nor is there any question about the time of payment. And the payment is not made dependent upon any condition whatever.

The agreement, that if the collateral proves insufficient for the payment of the note, and all necessary expenses and charges, the makers will be responsible for any deficiency, neither increases nor decreases the responsibility of the makers. It merely requires them to do what the law would compel them to do without such an agreement.<sup>1</sup>

We are of the opinion that the affidavit of defense was insufficient, and the judgment properly entered.

Judgment affirmed.

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<sup>1</sup> See especially, *Arnold v. R. R.*, 5 Duer (N. Y.), 207. — H.

(b) *Exceptions: (2) Authorizing confession of judgment.*

§ 24

OSBORN v. HAWLEY.

19 OHIO, 130. — 1850.

CALDWELL, J. — The action in the court below was *assumpsit*. The plaintiff declared as indorsee of a promissory note made by defendant for \$85.00. The declaration also contained the common counts. The case being at issue, the plaintiff offered the note in evidence, which was ruled out by the court, and the plaintiff nonsuited. The refusal by the court to permit the note to go in evidence is assigned for error. No argument is presented on either side, and the bill of exceptions only shows that the court decided that the note was not proper evidence in the cause.

On examination of the record, we do not see any objection to the note being in evidence, and we think the court erred in ruling it out. The note has attached to it, and forming a part of the instrument, a power of attorney to confess a judgment, and we presume the court may have held that that fact would prevent its negotiability. And on that presumption, we would merely remark that the power of attorney, being added to the note, does not in any way change the legal character of the note, except that it gives a more summary proceeding for its collection. It is still a promissory note, and being payable to order, is negotiable by indorsement. The power of attorney is not negotiable, and when the legal title to the note is transferred, the power of attorney becomes invalid, and no power whatever can be exercised under it, for the benefit of the indorsee; and he holds the note as if no such power had ever been attached to it.

The judgment of the Court of Common Pleas will be reversed, and the cause remanded for further proceedings.<sup>2</sup>

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<sup>2</sup> Contra: *Overton v. Tyler*, 3 BARR. (Pa.) 346. — H.

["It is quite certain that the note was not negotiable, because by the power of attorney which it contained, judgment could be entered upon it at any time after its date, whether due or not. Thus the time of payment depends upon the whim or caprice of the holder, and is absolutely uncertain. This deprives the note of its negotiability. . . . Ch. 356, Laws of 1899 (the Negotiable Instrument Law), provides that the negotiable character of an instrument is not affected by a provision authorizing a confession of judgment if the instrument is not paid at maturity. Sec. 1675-5, subd. 2 [N. Y., § 24, subd. 2]. Upon familiar principles of statutory construction this provision makes a note like the present non-negotiable." WINSLOW, J., in *Wisconsin Yearly Meeting v. Babler*, 115 Wis. 289, 292. — C.]

(b) *Exceptions: (3) Waiving exemptions.*

§ 24

ZIMMERMAN v. ANDERSON.

67 PENNSYLVANIA STATE, 421. — 1871.

In an action on a note the court charged that "the note offered in evidence not being negotiable has been rejected, and consequently there is no evidence to sustain the action, and you will find for defendant." Judgment for defendant and plaintiff appeals.

READ, J. — The paper in this case comes within all the definitions of the best text-writers of a promissory note, for it is a written promise by the defendant to pay E. W. Lowe or order one hundred and twenty-five dollars, six months after date, for value received with interest, absolutely and at all events. But it is urged that the words "waiving the right of appeal, and of all valuation, appraisements, stay and exemption laws," destroy its negotiability. In what way? They do not contain any condition or contingency, but after the note falls due and is unpaid, and the maker is sued, facilitate the collection by waiving certain rights which he might exercise to delay or impede it. Instead of clogging its negotiability it adds to it, and gives additional value to the note.

Judgment reversed and new trial ordered.

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(b) *Exceptions: (4) Election to require something in lieu of money.*

§ 24

HODGES v. SHULER.

22 NEW YORK, 114. — 1860.

THE action was against the defendants as indorsers of the following instrument or note:

RUTLAND AND BURLINGTON RAILROAD COMPANY.

No. 253.

\$1,000.

BOSTON, April 1, 1850.

In four years from date, for value received, the Rutland and Burlington Railroad Company promises to pay in Boston, to Messrs. W. S. & D. W. Shuler, or order, \$1,000, with interest thereon, payable semi-annually, as per interest warrants hereto attached, as the same shall become due; or upon the surrender of this note, together with the interest warrants, not due, to the treasurer, at any time until six months of its maturity, he shall issue to the holder thereof ten shares in the capital stock in said company in exchange therefor, in which case interest shall be paid to the date to which a dividend of profits shall have been previously declared, the holder not being entitled to both interest and accruing profits during the same period.

T. FOLLETT, *President.*

SAM. HENSHAW, *Treasurer.*

The court decided that the plaintiff was entitled to recover against the defendants, and gave judgment accordingly.

WRIGHT, J. — The single question is, whether the defendants can be held as indorsers. It is insisted that they cannot, for the reasons: 1st. That the instrument set out in the complaint, is neither in terms nor legal effect a negotiable promissory note, but a mere agreement; the indorsement in blank of the defendants; operating, if at all, only as a mere transfer, and not as an engagement to fulfill the contract of the railroad company in case of its default; and 2nd. That if it be a note, the notice of its dishonor was insufficient to charge the defendants as indorsers. \* \* \*

The instrument on which the action was brought has all the essential qualities of a negotiable promissory note. It is for the unconditional payment of a certain sum of money, at a specified time, to the payee's order. It is not an agreement in the alternative, to pay in money or railroad stock. It was not optional with the makers to pay in money or stock, and thus fulfill their promise in either of two specified ways; in such case, the promise would have been in the alternative. The possibility seems to have been contemplated that the owner of the note might, before its maturity, surrender it in exchange for stock, thus canceling it and its money promise; but that promise was nevertheless absolute and unconditional, and was as lasting as the note itself. In no event could the holder require money and stock. It was only upon a surrender of the note that he was to receive stock; and the money payment did not mature until six months after the holder's right to exchange the note for stock had expired. We are of the opinion that the instrument wants none of the essential requisites of a negotiable promissory note. It was an absolute and unconditional engagement to pay money on a day fixed; and although an election was given to the promisees, upon a surrender of the instrument six months before its maturity, to exchange it for stock, this did not alter its character, or make the promise in the alternative, in the sense in which that word is used respecting promises to pay. The engagement of the railroad company was to pay the sum of \$1,000 in four years from date, and its promise could only be fulfilled by the payment of the money, at the day named.

[Omitting the question of notice.]

I am of the opinion that the action was well brought against the defendants as indorsers of a negotiable promissory note, and that the notice of its dishonor was sufficient.

The judgment of the Supreme Court should be affirmed.

All the judges agreed that the instrument in suit was a promissory note; DENIO and WELLES, JJ., dissented on the ground that the

notice of non-payment was insufficient in omitting the number upon the margin of the note.<sup>3</sup>

Judgment affirmed.<sup>4</sup>

### III. Payable on demand or at a determinable future time.

#### 1. WHEN PAYABLE ON DEMAND.

§ 26

(a) *Payable at sight.*<sup>5</sup>

(b) *No time for payment expressed.*

§ 26

HERRICK *v.* BENNETT.

8 JOHNSON (N. Y.) 374. — 1811.

ASSUMPSIT on a promissory note. The first count of the plaintiff's declaration stated, that the defendant, on May 25, 1809, at, etc., made his certain promissory note in writing, subscribed, etc., and then and there delivered the same to the plaintiff, by which said note the defendant promised to pay to the plaintiff, or order, \$112.53; by reason whereof, etc. There was a demurrer to this count of the declaration, which was submitted to the court without argument.

PER CURIAM. It is to be presumed that the plaintiff has stated the note in his declaration, according to the terms of it, and that is sufficient. The conclusion of the law is, that where no time of payment is specified in a note, it is payable immediately. The first count, then, shows a cause of action, and the plaintiff is entitled to judgment.

Judgment for the plaintiff.<sup>6</sup>

<sup>3</sup> See §§ 166-167, *post.* — H.

<sup>4</sup> "I promise to pay to the order of W, \$55 at my store (or in goods on demand)," is a promissory note. *Hosstatter v. Wilson*, 36 Barb. (N. Y.) 307. Contra, *Dennett v. Goodwin*, 32 Me. 44. — H.

<sup>5</sup> "By the law merchant there are some distinctions between instruments payable on demand and those payable at sight; as, for example, in the matter of days of grace. See Daniel on Negotiable Instruments, §§ 617-619. [Demand bills or notes were not entitled to days of grace, but there was a conflict of authority as to instruments payable at sight, the weight of authority holding that they were so entitled. — C.] This was also the effect of former statutes in some of the states. *Walsh v. Dart*, 12 Wis. 635. The new statute abolishes all these distinctions." Crawford's Negotiable Instruments Law, 3d ed., p. 18.

Days of grace are abolished by § 145 of the New York act. — C.

<sup>6</sup> Accord: *Bacon v. Page*, 1 Conn. 404; *Jones v. Brown*, 11 Oh. St. 601; *Messmore v. Morrison*, 172 Pa. St. 300; *Bank v. Price*, 52 Iowa, 570; *Libby v. Mikelborg*, 28 Minn. 38; *Roberts v. Snow*, 27 Neb. 425. — H.

(c) *Issued, accepted or indorsed when overdue.*

§ 26

LIGHT v. KINGSBURY.

50 MISSOURI, 331. — 1872.

ADAMS, JUDGE. \* \* \* But it is unnecessary to review any of the positions assumed by counsel in this case, as the petition on its face does not state facts sufficient to constitute a cause of action against the defendants as indorsers of this note. It is a negotiable note, indorsed after due. Such indorsement is equivalent to drawing a new bill at sight, and the same diligence in making demand and giving notice is required to charge the indorsers. (See *Davis v. Francisco*, 11 Mo. 572, opinion of SCOTT, J.; also *Moody et al v. Mack*, 43 Mo. 210; *Berry v. Robinson*, 9 Johns. 121; *McKinney v. Crawford*, 8 Serg. & R. 351; *Rugby v. Davidson*, 2 Mills Const. 337.)

The petition alleges that the indorsement was made about the 19th of April, and alleges a demand and refusal on the 3d of July following, and gives no excuse whatever for the delay. Even if this petition could be held good after verdict, there was nothing in the evidence to justify the delay in presenting the note for payment, and the indorsers were discharged by such delay.<sup>8</sup>

Judgment affirmed. The other judges concur.

## 2. WHEN PAYABLE AT A FIXED OR DETERMINABLE FUTURE TIME.

(a) *A fixed time after date or sight.*

§ 23

SIEGEL v. CHICAGO, ETC., CO.

[Reported herein at p. 190.]

(b) *On or before a fixed or determinable time specified.*

§ 23

JORDAN v. TATE.

19 OHIO STATE, 586. — 1869.

MOTION for leave to file a petition in error to reverse a judgment of the District Court of Montgomery county, affirming the judgment of the Court of Common Pleas.

<sup>7</sup> "A negotiable instrument indorsed after maturity is regarded as equivalent to one payable on demand. Such a bill or note, though overdue, continues to be negotiable, and is in the nature of a new bill payable on demand. *Daniel on Neg. Inst.*, §§ 611. 996; *Beer v. Clifton*, 98 Cal. 326, 33 Pac. 204." HART, J., in *Wills v. Booth*, 6 Cal. App. 197, 201.

"As between indorser and indorsee, such note is to be treated as a note on demand, dated at the time of the transfer, so far as demand and notice are concerned." RICE, J., in *Goodwin v. Davenport*, 47 Me. 112, 116. — C.

<sup>8</sup> Accord: *Bussenhorst v. Wilby*, 45 Ohio St. 333 (delay from July 30 to Nov. 21). See *Neg. Inst. L.*, § 131. — H.



BY THE COURT: The negotiable character of a promissory note is not affected by the fact that it is made payable by its terms on or before a future day therein named. Though the maker has a right to pay such note at any time after its date, yet for all purposes of negotiation it is to be regarded as a note payable solely on the day therein named.

Motion overruled.<sup>9</sup>

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§ 23

RIKER *v.* SPRAGUE MFG. CO.

[Reported herein at p. 68.]

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§ 23 FIRST NATIONAL BANK OF POMEROY, IOWA,

*v.* BUTTERY.

17 NORTH DAKOTA, 326. — 1908.

Judgment for defendant, and plaintiff appeals.

SPALDING. — This is an action on a promissory note. The note was sued on by the indorsee for value before maturity, and the court found that there was a failure of consideration, and that the contract was not a negotiable note, and entered judgment for the dismissal of the action. Only one question requires consideration. If the instrument in question is a negotiable promissory note, the judgment should be reversed; otherwise, it should be affirmed.

The note was made in this state, and is payable at Sioux City, Iowa, and the clause which the trial court held rendered it non-negotiable reads: "The makers and indorsers herein, severally waive presentment of payment and notice of protest, and consent that the time of payment may be extended without notice." There is an apparent conflict of authorities as to whether this or similar agreements render the note non-negotiable. The note is, by its terms, made payable on or before the 1st of October, 1903. Without the paragraph complained of, it would unquestionably be a negotiable instrument, and the indorsers would be released by any extension of time of payment without their assent. We are of the opinion that this provision does not extend the time of payment indefinitely or render it uncertain. The time of payment is already fixed.

It is strenuously argued that the use of the word "makers" in the waiver admits of an extension being made at any time on the part of the holder, by a mere secret mental process, unknown to any other

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<sup>9</sup> Accord: *Mattison v. Marks*, 31 Mich. 421. Contra: *Stults v. Silva*, 119 Mass. 137. — H. [Accord: *Leader v. Plante*, 95 Me. 339. — C.]

party. This may be true as a psychological fact, but we do not deem it so as a matter of practice in commerce and banking. To us it is clear that it has the same effect as though the note read "on the 1st day of October, 1903, or thereafter on demand," in which case there would be no question of its negotiability. Holders of notes do not by a secret mental process make an extension of the time of payment, but such extension, if made at all, is made by an agreement between the principal debtor and the holder of the paper, either with or without the consent of the indorsers. This provision seems to us to have been inserted to protect the holder against any release of indorsers or others, by an extension without their assent, and the word "makers" is evidently included to prevent any misunderstanding or misconstruction of the contract or failure to distinguish between makers, indorsers, sureties, and any other parties who might be or become liable thereon under certain contingencies as makers. 7 Cyc. 614. This phrase does not express an agreement to extend time, but leaves the matter of extension optional with the holder, and not obligatory upon him, and the note on its face fixes the time when it becomes due. In this respect it must be distinguished from a provision to the effect that the time of payment shall be extended indefinitely, in which case the uncertainty of the time renders the instrument non-negotiable.

We feel that the reasoning in the *National Bank of Commerce v. Kenney*, 98 Tex. 293, 83 S. W. 368, is not only satisfactory, but conclusive of this point. The note involved in that case contained this provision: "The makers and indorsers hereof hereby severally waive protest, demand, and notice of protest and non-payment in case this note is not paid at maturity, and agree to all extensions and partial payments before or after maturity, without prejudice to the holder." In holding that this provision did not render the note non-negotiable, the Texas court says: "If, as is argued, the effect of the stipulation is to give the right to the maker, without the consent of the holder, or to the holder without the consent of the maker to appoint another date of payment, and thereby extend the time, it may be that it would render the instrument non-negotiable. But we do not think it capable of that construction. It does not say that either the holder or the maker may extend the note. It simply makes a provision in case the time of payment may be extended. How extended? It seems to us that the extension meant is that which takes place when the debtor and creditor make an agreement upon a valuable consideration for the payment of the debt on some day subsequent to that previously stipulated. The obvious purpose of the stipulation taken as a whole was merely to relieve the holder of the paper from the burdens made necessary by the rigid requirements of the mercantile law in order to secure the continued liability of the indorsers and sureties on the paper. Therefore what was meant by the stipulation as to extension

of time was simply that in case the holder and maker should agree upon an extension the sureties and indorsers should not be discharged. The holder and maker of a note may at any time agree upon an extension; therefore, the fact that they have that right does not affect the negotiability of the paper. It is usually said that, in order to make an instrument negotiable under the law merchant, the time of payment must be certain. But a note payable on or before a certain date is negotiable. The maker of such a note has the right to pay before the date named, but the holder cannot demand payment before that date. So, in this case, the time at which the maker may elect to pay is uncertain, but the time at which the holder may demand payment is certain. It follows that if the holder has the absolute right to demand payment at a certain date, the note is negotiable. This is but an illustration of what we understand to be the general rule. There being nothing in the stipulation under consideration, which gave any one the right to demand of the holder of the note an extension of the time of payment, we think the time at which he could demand payment was fixed, and that, therefore, it was a negotiable note." \* \* \*

[After discussing *Jacobs v. Gibson*, 77 Mo. App. 244, *Bank v. Commission Co.*, 93 Mo. App. 123, and *Farmer v. Bank*, 130 Iowa, 467, the court continues:]

We are, however, of the opinion that, under the plain terms of the negotiable instruments act of this state, this note is negotiable, without reference to other authority.

Section 6486,<sup>1</sup> Rev. Codes 1905, defines a negotiable promissory note as follows: "A negotiable promissory note within the meaning of this chapter is an unconditional promise in writing, made by one person to another, signed by the maker, engaging to pay on demand, or at a fixed or a determinable future time, a certain sum of money, to order or to bearer." Section 6309<sup>2</sup> provides that an instrument is "payment on demand. \* \* \* 2. In which no time, for payment is expressed." Section 6422<sup>3</sup> provides how such an instrument is "discharged against a person secondarily liable thereon." Paragraph 6 thereof provides that it is discharged by any agreement binding upon the holder to extend time of payment, or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right to recourse against such party is expressly reserved.

If, as is contended by the respondent in the case at bar, this instrument, taken as a whole, expresses no time for payment, then, under section 6309, it is an instrument payable on demand, and according to

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<sup>1</sup> N. Y., § 320. — C.

<sup>2</sup> N. Y., § 26. — C.

<sup>3</sup> N. Y., § 201. — C.

section 6486 the negotiability of a promissory note is not destroyed by its being made payable on demand. On the other hand, if it does express a time for payment, the 1st day of October, 1903, is a fixed and determinable future time as required by section 6486, *supra*. This note was executed and dated within this state, and we are satisfied that the paragraph complained of as rendering it non-negotiable was drawn for the express purpose of protecting it within the terms of paragraph 6, § 6422, above quoted, and in accordance with other statutory provisions providing for waiver of presentment, notice of dishonor, and protest. Notes containing clauses similar to the one in question have been in almost universal use in this state for years, and the identical waiver complained of has been in common use, and the instruments containing them have been regarded and treated by the trade and bankers as negotiable.

For the reasons stated, the judgment of the District Court is reversed.

POLLOCK, District Judge, concurs.

FISK, J., disqualified; Hon. CHAS. A. POLLOCK, judge of the Third Judicial District, sitting by request.

MORGAN, C. J. (dissenting). I am unable to concur in the conclusion reached by my associates in this case. My reasons for reaching an opposite conclusion may be briefly stated.

The statute in express terms requires that the time of payment must be definitely stated in the note or that it can be definitely determined therefrom when it becomes payable, or it will be rendered non-negotiable. From the face of the note, it seems to me conclusive that it does not show when the note may become due and payable in view of the fact also stated therein that an extension may become operative and binding. It does not seem to me to be a sound conclusion to say that the note states a fixed day of payment when it also states that the day stated may not represent the date of payment if the stipulation as to an extension that follows is put into effect. The note cannot be said to be a demand note, as by its very terms it is not such. It fixes day of payment, subject to extensions. So far as having no fixed day of payment is concerned, the time is rendered as uncertain by reason of possible extensions as it would be if it provided for extensions indefinitely, and is therefore fairly within the principles of the Iowa cases cited in the opinion. In *Bank v. Gunter*, 67 Kan. 227, the note contained this stipulation: "The makers and indorsers hereby severally \* \* \* agree to all extensions \* \* \* before or after maturity without prejudice to the holder," and in reference to the effect thereof upon the negotiability of the note, the court said: "In the note in question, payment is first fixed at 182 days after the date, but as will be observed, a later provision makes the time indefinite by stipulating that it may be changed and extended either before or after maturity. If the time is to remain fixed until maturity, when another time is to

be fixed by the parties, or if payment is made to depend upon events which necessarily must occur, and the time of payment is ultimately certain, other considerations would arise; but here payment is not ultimately certain, for the time stated in the paper is subject to change at any time at the volition of some of the parties to the action."

In *Coffin v. Spencer* (C. C.) 39 Fed. 262, the court said in reference to a similar stipulation: "Every successive taker of the paper is, of course, bound to take notice of the stipulation, and, instead of looking only to the face of the instrument for the time of its maturity, as in case of commercial paper he must, is put upon inquiry whether or not any agreement for a renewal or extension of time has been made by his proposed assignor or by any previous holder."

In *Oyler v. McMurray*, 7 Ind. App. 645, the court said in speaking of a like stipulation: "The holder was not bound by the stipulation in either case to extend the time of payment. The material and controlling fact is that the holder had the option, at any time before as well as after the time of payment stated in the note, to extend to the drawers and indorsers, or either of them, the time of payment."

The following authorities specifically hold that stipulations like the one contained in the note in suit render the note non-negotiable: 7 Cyc. 600, and cases cited; *Daniel on Neg. Inst.* (5th ed.) p. 49; *Eaton & Gilbert on Commercial Paper*, p. 220; *Smith v. Van Blarcom*, 45 Mich. 371; *Woodbury v. Roberts*, 59 Iowa, 348; *Hodge v. Farmers' Bank of Frankfort*, 7 Ind. App. 94; *Oyler v. McMurray*, 7 Ind. App. 645; *Glidden v. Henry*, 104 Ind. 278; *Rosenthal v. Rambo*, 28 Ind. App. 265; *Id.*, 165 Ind. 584; *Evans v. Odem*, 30 Ind. App. 207; *Second National Bank v. Wheeler*, 75 Mich. 546; *Lamb v. Story*, 45 Mich. 488; *Oyler v. McMurray*, 7 Ind. App. 645; *Citizens' Nat. Bank v. Piollet*, 126 Pa. 194.

On principle and authority, the note should be held non-negotiable.<sup>1</sup>

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(c) *On or at a fixed period after the occurrence of a specified event.*

## § 23

## SHAW v. CAMP.

160 ILLINOIS, 425. — 1896.

MR. JUSTICE CARTWRIGHT delivered the opinion of the court:

Appellee filed a claim in the County Court of Piatt county, against the estate of Edward Swaney, deceased, and the claim was rejected. In the Circuit Court, on appeal, there was a trial by a jury and a verdict for the claimant for \$852.50, upon which judgment was entered. The judgment was affirmed by the Appellate Court and a certificate of importance granted, under which the case is brought

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<sup>1</sup> See note to this case entitled "Effect on negotiability of promissory note of provision permitting extension of time," in 16 L. N. S. 878. See also note in 125 Am. St. Rep. 201. — C.

to this court. On the trial the claimant offered in evidence the instrument upon which his claim was founded, together with proof of the signature of the deceased. The instrument was as follows:

\$750.00

BEMENT, ILL., Dec. 27, 1890.

After my death date I promise to pay E. Hanson Camp, or order, the sum of \$750, without interest at      per cent. per annum from date, value received.

Following the above there was a power of attorney, in the usual form, to confess judgment, and the signature of Edward Swaney. To the introduction of this instrument objection was made and overruled, and it is insisted that the ruling was wrong, for the reason that the instrument was not a promissory note. It is conceded that a promissory note may be made payable on the death of a certain person, or at a fixed time thereafter, or on demand after such death; but it is claimed that this instrument was not payable at a time fixed, and that the words "after my death date" should be construed to mean some uncertain time after that event. We do not regard the instrument as subject to the objection made. It did not become due until the death of the maker, which was an event certain to occur, but by its terms it became due at once after the occurrence of that event. There is nothing in the language to indicate that the money was to be paid at some uncertain time after the maker's death. The objection was properly overruled.<sup>2</sup>

### 3. WHEN PAYABLE ON A CONTINGENCY.<sup>3</sup>

#### § 23

#### KELLEY v. HEMMINGWAY.

13 ILLINOIS, 604. — 1852.

TREAT, C. J. This was an action brought by Hemmingway against Kelley before a justice of the peace, and taken by appeal to the Circuit Court. On the trial in the latter court, the plaintiff offered in evidence an instrument in these words:

CASTLETON, April 27, 1844.

Due Henry D. Kelley fifty-three dollars, when he is twenty-one years old, with interest.

DAVID KELLEY.

[On the back of which was this indorsement]

ROCKTON, May 1, 1849.

Signed the within, payable to Moses Hemmingway.

HENRY KELLEY.

<sup>2</sup> A bill or note payable so many days after the death of a party is certain as to time, because the time is sure to arrive. *Colchan v. Cooke*, Willes, 393; affirmed 2 Str. 1217; *Bristol v. Warner*, 19 Conn. 7, *post*; *Conn v. Thornton*, 46 Ala. 587; *Price v. Jones*, 105 Ind. 543; *Carrucright v. Gray*, 127 N. Y. 92; *Hegeman v. Moon*, 131 N. Y. 462; *ante*, p. 41; *Martin v. Stone*, 67 N. H. 367. — H.

<sup>3</sup> See note in 125 Am. St. Rep. 202. — C.

The plaintiff proved that the payee became of age in August, 1849. The defendant objected to the introduction of the instrument because it was not negotiable, but the court admitted it in evidence and rendered judgment for the plaintiff.

Our statute makes promissory notes assignable by indorsement in writing, so as absolutely to vest the legal interest in the assignee. Was the instrument in question a promissory note? To constitute a promissory note, the money must be certainly payable, not dependent on any contingency, either as to event, or the fund out of which payment is to be made, or the parties by or to whom payment is to be made. If the terms of an instrument leave it uncertain whether the money will ever become payable, it cannot be considered as a promissory note. (*Chitty on Bills*, 134.) Thus, a promise in writing to pay a sum of money when a particular person shall be married is not a promissory note, because it is not certain that he will ever be married. (*Pearson v. Ganet*, 4 Mod. 242; *Beardesley v. Baldwin*, 2 Strange, 1151.) So of a promise to pay when a particular ship shall return from sea, for it is not certain that she will ever return. (*Palmer v. Pratt*, 2 Bing. 185; *Coolidge v. Ruggles*, 15 Mass. 387.) In all such cases, the promise is to pay on a contingency that may never happen. But if the event on which the money is to become payable must inevitably take place, it is a matter of no importance how long the payment may be suspended. A promise to pay a sum of money on the death of a particular individual is a good promissory note, for the event on which the payment is made to depend will certainly transpire. (*Colehan v. Cooke*, Willes, 393; s. c. 2 Strange, 1217.)

In this case, the payment was to be made when the payee should attain his majority — an event that might or might not take place. The contingency might never happen, and therefore the money was not certainly and at all events payable. The instrument lacked one of the essential ingredients of a promissory note, and consequently was not negotiable under the statute. The fact that the payee lived till he was twenty-one years of age makes no difference. It was not a promissory note when made, and it could not become such by matter *ex post facto*. The plaintiff has not the legal title to the instrument. If it presents a cause of action against the maker, the suit must be brought in the name of the payee. The case of *Goss v. Nelson*, (1 Burr, 226), is clearly distinguishable from the present. There, the note was made payable to an infant when he should arrive at age, and the day when that was to be was specified. The court held the instrument to be a good promissory note, but expressly on the ground that the money was at all events payable on the day named, whether the payee should live till that time, or die in the interim; and it was distinctly intimated, that the case would be very

different had the day not been stated in the note. It was regarded as an absolute promise to pay on the day specified, and no effect was given to the words that the payee would then become of age.

The judgment must be reversed.

Judgment reversed.<sup>4</sup>

§ 23 SACKETT *v.* PALMER, 25 Barbour (N. Y.), 179. — 1857. Action on a note payable “ninety days after the dissolution of the partnership between A. B. and C. D., and the settling of the books of said firm.” JOHNSON, J. The instrument on which the action is brought is not a promissory note. It is payable ninety days after the happening of two events, one of which may never happen. The general rule is, that an instrument payable only in money, is not a promissory note, unless it is payable at all events, not depending on any contingency. Though if the event on which the instrument is to become payable must inevitably happen, it is no objection that it is uncertain when it will happen; nor is it of any importance how long the payment may be in suspense; it will still be regarded as a promissory note. (*Chit on Bills* [8th Am. ed.], 155, 156.) It is not shown by the evidence how long the partnership was to continue by the agreement of the partners. It was certain, however, that there would at some time be a dissolution, by the death of one of the partners, if not otherwise. That event was sufficiently certain. But the settling of the books of the firm was an event which might never happen. It would not inevitably happen. It might, and probably would, after a dissolution, in due course of law. But that is not enough; if it might not happen the instrument is not a promissory note.

## § 23 AMERICAN NATIONAL BANK *v.* SPRAGUE.

14 RHODE ISLAND, 410. — 1884.

ACTION against indorsers on an instrument similar to the one in *Riker v. Sprague Mfg. Co.*, (*ante*, p. 68), except that it was indorsed as follows:

<sup>4</sup> A note reading “Upon confirmation by the Congress of the United States of the certain land grant known as . . . I promise to pay,” etc., held non-negotiable since it was not certainly and at all events payable; it not being certain that the grant would ever be confirmed by Congress, or through its instrumentalities. “It is no answer . . . to show that the grant in question has, as a matter of fact, been confirmed by the court of private land claims. . . . The question is, What were the conditions when the contract was made? Negotiability is to be judged by the front sight, not by the back sight. The moral certainty must be present at the time of its execution and not be a matter of relation accruing by reason of subsequent events. If it be



"Issued as collateral to A. & W. Sprague Mfg. Co.'s draft accepted by Hoyt, Spragues & Co., No. 6806."

TILLINGHAST, J. \* \* \* It will at once be seen that these notes differ very materially from those declared on in the former case, and also that under the rule therein adopted they are clearly not negotiable. They were issued as collateral to certain drafts therein specifically designated, and obviously are not payable at all events; it being evident that the payment of the drafts would at once discharge both the makers and indorsers of the notes, and render said notes null and void. So also a partial payment on the drafts would at once reduce the amount collectible on the notes *pro tanto*.

The undertaking of the defendants, therefore, was at most a contingent one, and the sum which might become due at the expiration of the notes was uncertain. \* \* \*

Without considering the other points raised by the petition, we must, therefore, grant a new trial.

Petition granted.<sup>5</sup>

#### IV. Payable to order or to bearer.

##### 1. MUST BE PAYABLE TO ORDER OR BEARER TO BE NEGOTIABLE.<sup>6</sup>

§ 20

WETTLAUFER v. BAXTER.

[Reported herein at p. 145.]

not a bill or note *ab initio*, no subsequent event can make it so." POPE, J., in *Joseph v. Catron*, 13 N. M. 202, 223. See this case reported with note in 1 L. N. S. 1120.

See also to the same effect *Eldred v. Malloy*, 2 Colo. 320. — C.

<sup>5</sup> In *Citizens' Nat. Bank v. Piollet*, 126 Pa. St. 194, a note containing a memorandum that "This note is given for advancements and it is the understanding it will not be renewed at maturity" was held non-negotiable. "The statement that it is given for advancements does not affect the certainty of the note, and it could easily be regarded as a mere memorandum not changing the contract and therefore not material. But the remainder of the writing is an agreement that the note will be renewed at maturity. As the bank is the holder and discounted the note when it was given, it . . . must be considered as having agreed to renew the note at its maturity. This being so, the obligation of the note is not an absolute, unconditional contract to pay the money at maturity. It is a qualified obligation to pay, with a condition that, instead of paying, the holder may give another note in its place which the bank would be bound to accept instead of money. This being so, the case comes within the rule that commercial paper, to be negotiable, must be certain, unconditional, and not contingent." GREEN, J., at p. 197. — C.

<sup>6</sup> It is to be observed that the Neg. Inst. Law applies only to instruments containing words of negotiability. An instrument not containing words of negotiability may be a bill or note, but it is not covered by this Act. The English Bills of Exchange Act makes negotiable any bill or note which does not contain words prohibiting transfer; but this changes the law. *Chalmers*, Bills of Exchange Act (5th ed.), p. 25. — H.

## 2. PAYABLE TO THE ORDER OF A SPECIFIED PERSON.

(a) *Payee must be certain.*

## § 27 GORDON v. LANSING STATE SAVINGS BANK.

133 MICHIGAN, 143. — 1903.

JUDGMENT for plaintiff, and defendant brings error.

MOORE, J. — This case was tried by the Circuit judge without a jury. At the request of the defendant, he made a finding of facts, which is as follows:

“Monday morning, December 9, 1901, at about nine o'clock, there was presented at the bank of defendant at the city of Lansing for payment the following check, made upon the printed form of check supplied by defendant to its patrons, and signed by plaintiff, viz.:

“ ‘ LANSING, MICH., 190      No.

“ ‘ LANSING STATE SAVINGS BANK OF LANSING.

“ ‘ Pay to the order of ..... nine hundred and seventy dollars (\$970.00).

“ ‘ JNO. R. GORDON.’

“The check was indorsed by Charles P. Downey, and was presented by an employee of Mr. Downey, and cash was paid at the time of presentation. The plaintiff had been a depositor at defendant's bank at periods for three or four years, and at the opening of the bank on the morning of December 9, 1901, his balance or credit upon the books of the bank was \$3.40, but during the day \$2,997.50 was added to plaintiff's credit. The day defendant cashed the check plaintiff was at the bank, and was informed that the check for \$970 had been cashed by payment to Mr. Downey, and he then notified defendant he would not accept the check as a voucher for the money paid. December 14, 1901, plaintiff prepared and presented to defendant his check, payable to himself, for \$970, being the amount he claimed to then have on deposit in the bank. Payment on this check was refused by defendant upon the ground that plaintiff had no funds in the bank.”

The Circuit judge rendered a judgment in favor of the plaintiff for \$970 and interest. The case is brought here by writ of error.

Two questions are discussed by counsel: First, the effect of not dating the check; second, has the check a payee? We do not deem it necessary to discuss the first question. As to the second question, it will be noticed the drawer of the check did not name a payee therein, nor did he leave a blank space where the name of a payee might be inserted, nor did he name an impersonal payee. In the case of *McIntosh v. Lytle*, 26 Minn. 336,\* the court used the following language: “A

\* In this case the instrument sued on read as follows:

“\$200.

ST. PAUL, MINN., Jan. 22, 1879.

Dawson & Co., Bankers: Pay to the order of, on sight, two hundred dollars, in current funds.

E. LYTLE.” — C.

check must name or indicate a payee. Checks drawn payable to an impersonal payee, as to 'Bills Payable' or order, or to a number or order, are held to be payable to bearer, on the ground that the use of the words 'or order' indicate an intention that the paper shall be negotiable; and the mention of an impersonal payee, rendering an indorsement by the payee impossible, indicates an intention that it shall be negotiable without indorsement — that is, that it shall be payable to bearer. So, when a bill or note or check is made payable to a blank or order, and actually delivered to take effect as commercial paper, the person to whom delivered may insert his name in the blank space as payee, and a *bona fide* holder may then recover on it. These cases differ essentially from the one at bar. In the latter case the person to whom delivered is presumed, in favor of a *bona fide* holder, to have had authority to insert a name as payee. In the former case the instrument is, when it passes from the hands of the maker, complete, in just the form the parties intend. But in this case there is neither a blank space for the name of the payee, indicating authority to insert the payee's name, nor is the instrument made payable to an impersonal payee, indicating a fully completed instrument. It is claimed that the words 'on sight' are such impersonal payee. They were inserted, however, for another purpose — to fix the time of payment, and not to indicate the payee. It is clearly the case of an inadvertent failure to complete the instrument intended by the parties. The drawer undoubtedly meant to draw a check, but, having left out the payee's name, without inserting in lieu thereof words indicating the bearer as a payee, it is as fatally defective as it would be if the drawee's name were omitted."

See, also, *Rush et al. v. Haggard*, 68 Tex. 674; *Prewitt v. Chapman*, 6 Ala. 86; *Brown v. Gilman et al.*, 13 Mass. 160; *Rich et al. v. Starbuck*, 51 Ind. 87; *Norton*, Bills & Notes (3d ed.) p. 59, and notes; *Daniels*, Neg. Inst. (4th ed.) § 102.

The case differs from the one at bar in some respects, but the important part of the decision is that a payee is necessary to make a complete instrument, and, even though the maker of the check may have intended to name a payee, if he has not in fact done so the check is incomplete. In the case at bar the failure to name a payee was not an oversight, if we may judge from what Mr. Gordon did, as will appear more in detail later.

Our attention has been called to *Crutchly v. Mann*, 5 Taunton R. 529. In this case the bill of exchange was made payable to the order of . . . . . The court found that under the facts shown the conclusion was irresistible that the name was filled in with the consent of the drawer. The same case was previously reported in 2 Maule & Selw. 90, where, as the case then stood, it appeared the bill of exchange had been sent out, the defendant leaving a blank for the name of the

payee. One of the judges was of the opinion that the defendant, by leaving the blank, undertook to be answerable for it, when filled up in the shape of a bill of exchange; another judge was of the opinion that it was as though the defendant had made the bill payable to bearer; while the third judge was of the opinion that the issuing of the bill in blank without the name of the payee was an authority to a *bona fide* holder to insert the name.

In the case of *Harding v. The State*, 54 Ind. 359, a promissory note was drawn leaving a blank space for the name of the payee, and it was held: "So the name of the payee may be left blank, and this will authorize any *bona fide* holder to insert his own name." In the case of *Brummel et al. v. Enders et al.*, 18 Grat. 873, promissory notes, blank as to the names of the payees, had been put in the hands of an agent to be sold for the benefit of the makers. The agent sold them, at a greater discount than the legal rate of interest, to purchasers who did not know they were sold for the benefit of the makers. At the time of the sale the name of the purchasers was inserted, either by the purchasers or by the agent, in the blank left for the payee. When the notes were sued, the makers pleaded usury. The court, following the cases already cited, held that any *bona fide* holder of a bill or note which is blank as to the name of the payee may insert his own name, and thus acquire all the rights of the payee.

It will be observed that the case at bar differs from all of these cases. As before stated, not only did Mr. Gordon fail to insert the name of a payee, or to leave a blank where the name of the payee might be inserted, but he did more. He drew a line through the blank space, making it impossible for any one else to insert therein a name, indicating very clearly that he not only declined to name a payee, but intended to make it impossible for any one else to do so. Had Mr. Gordon issued a check otherwise perfect, but with the blank space for the amount of the check unfilled, and delivered it to a third person, it would be presumed the third person was given authority to fill the blank space. But had he, instead of leaving the space a blank, filled it by drawing a line through it, would any one say the third person might then insert a sum of money in that space? If not, upon what principle may the name of a payee be inserted when the space was filled in the same way, or upon what theory may it be presumed there was an impersonal payee when the maker has not made the check payable to cash, or some other impersonal payee. In order to construe the check as a complete instrument, we must read into it an intention not only not expressed by its language, but contrary to the act of the maker. The check, as it appears to-day, is without any payee. The record is silent in relation to whom it was delivered, or whether the person who presented it at the bank or the person whose indorsement it bears was a *bona fide* holder.

Judgment is affirmed.

Montgomery, J., did not sit. Hooker, C. J., concurred with Moore, J.

CARPENTER, J. I regret that I cannot concur in the opinion of my Brother Moore. I agree with him that the check in question is not governed by the authorities which hold that, where a blank is left for the insertion of the name of a payee, the instrument is to be treated as payable to bearer. I cannot agree, however, that the case of *McIntosh v. Lytle*, 26 Minn. 336, is controlling. That case resembles this in many particulars. There is, however, a difference, which, in my judgment, renders the reasoning of that case inapplicable. The fact that the plaintiff in the case at bar used the ordinary blank, and drew a line through the space intended for the name of the payee, prevents our assuming, as did the court there — and its decision was based on this assumption — that it is “the case of an inadvertent failure to complete the instrument intended by the parties.” The instrument under consideration is obviously complete, in just the form the maker intended.

In my judgment, the authorities which hold a check payable to the order of an impersonal payee to be valid and negotiable control this case. I quote from the case of *Willeys v. The Phoenix Bank*, 2 Duer (N. Y.) at page 129: “One of the checks was payable to the order of 1658, the other three to the order of bills payable; and, as the required order could not in either case possibly be given, the checks, unless transferable by delivery, were payable to no one, and were void upon their face. The law is well settled that a draft payable to the order of a fictitious person, inasmuch as a title cannot be given by an indorsement, is, in judgment of law, payable to bearer. *Vere v. Lewis*, 3 Term R. 183; *Minet v. Gibson*, Id. 481; *Gibson v. Minet*, 1 H. Black. 569, affirmed in the House of Lords. And it seems to us quite manifest that in principle these decisions embrace the present case. At any rate, the bank, by certifying the checks as good, is estopped from denying that they were valid as drafts upon the funds of the maker, and, consequently, were payable to bearer. The giving of such a certificate, if otherwise construed, would be a positive fraud.”

In *Mechanics' Bank v. Straiton*, 3 Abb. Dec. (N. Y.) 269, a check payable to bills payable or order was held payable to bearer, the court saying: “By naming the persons to whose order the instrument is payable, the maker manifests his intention to limit its negotiability by imposing the condition of indorsement upon its first transfer. But no such condition is indicated by the designation of a fictitious or impersonal payee, for indorsement, under such circumstances, is manifestly impossible; and words of negotiability, when used in connection with such designations, are capable of no reasonable interpretation, except as expressive of an intention that the bill shall be negotiable without indorsement — *i. e.*, in the same manner as if it had been made payable to bearer.”

We must decide that the check in the case at bar, like those in the cases cited, is either altogether void, or is transferable by delivery. I submit that we should follow those cases, and decide that it is transferable by delivery. To quote the language of Lord Ellenborough, in *Cruchley v. Clarence*, 2 Maule & Selw. 90: "As the defendant has chosen to send the bill [check] into the world in this form, the world ought not to be deceived by his acts."

This view of the case compels me to notice the fact that the check under consideration is not dated. According to the weight of authority, this omission does not invalidate it. See *Zane on Banks & Banking*, § 152; *Daniels on Negotiable Instruments*, § 1577; *Norton on Bills & Notes*, p. 405, note.

I think the judgment of the court below should be reversed, and a judgment entered in this court for the defendant.

Grant, J., concurrd with Carpenter, J.<sup>1</sup>

## § 27

## SHAW v. SMITH.

150 MASSACHUSETTS, 166. — 1889.

CONTRACT by the administrator *de bonis non* of the estate of Frederick B. Bridgman, against the administrator of the estate of Eugene Bridgman, upon the following instrument:

\$126.00

BELCHEERTOWN, July 19, 1873.

For value received, I promise to pay F. B. Bridgman's estate, or order, one hundred and twenty-six dollars on demand, with interest annually.

EUGENE BRIDGMAN.

Witness, A. BRIDGMAN.

Writ dated March 13, 1886. The answer set up, among other defenses, the statute of limitations.

The judge ruled that the instrument was not a witnessed promissory note, within the meaning of the statute, and was therefore barred by the statute of limitations, and found for the defendant; and the plaintiff alleged exceptions.

C. ALLEN, J. After providing that the ordinary limitation of actions of contract shall be six years, it is enacted in the Pub. Sts. (c. 197, § 6), that "none of the foregoing provisions shall apply to an action brought upon a promissory note signed in the presence of an attesting witness, if the action is brought by the original payee, or by his executor or administrator;" and by § 7, such an action may be brought within twenty years. The defendant contends that the instrument sued on is not a promissory note, for want of a sufficiently definite payee, and he cites two decisions which sustain him in this

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<sup>1</sup> It should be observed that the judgment below was affirmed by an evenly divided court. — G.

contention. (*Lyon v. Marshall*, 11 Barb. 241; *Title v. Thomas*, 30 Miss. 122.)

But this would be too strict an application of the doctrine that the person to whom a note is payable must be clearly expressed. It is an equally general rule, that it is sufficient if there is in fact a payee, who is so designated that he can be ascertained. (*Story on Notes*, § 36.) The illustrations of the manner in which this rule has been applied are numerous. Thus, written promises have been held to be valid notes or bills of exchange, though made payable to bearer, (*Grant v. Vaughan*, 3 Burr. 1516); or to persons designated simply by their office, without naming them, *e. g.* the treasurer of the First Parish in H. or his successor in said office, (*Buck v. Merrick*, 8 Allen, 123); the trustees of a particular church, (*Noxon v. Smith*, 127 Mass. 485; *Holmes v. Faques*, L. R. 1 Q. B. 376); the manager of the Provincial Bank of England, (*Robertson v. Sheward*, 1 Man. & G. 511); the treasurer-general of the Royal treasury of Portugal, (*Soares v. Glyn*, 8 Q. B. 24); the executors of the late W. B., (*Hamilton v. Aston*, 1 C. & K. 679); the administrators of a particular estate, (*Moody v. Threlkeld*, 13 Ga. 55; *Adams v. King*, 16 Ill. 169); the trustees acting under the will of the late Mr. W. B., (*Megginson v. Harper*, 2 Cr. & M. 322). Also to the heirs of a particular person, even though that person was living at the time, (*Bacon v. Fitch*, 1 Root, 181; *Lockwood v. Jesup*, 9 Conn. 272; *Cox v. Beltzhoover*, 11 Miss. 142); to a business name adopted by the person in interest, (*Bryant v. Eastman*, 7 Cush. 111; *Brown v. Parker*, 7 Allen 337); and to the steamboat *Juda* and owners, (*Moore v. Anderson*, 8 Ind. 18). So, a bill which was indorsed to a person who was already deceased was held valid in the hands of his legal representatives. (*Murray v. East India Co.*, 5 B. & Ald. 204.) More literally in point in the present case, and directly opposed to the two decisions relied on by the defendant, are *Peltier v. Babillion*, (45 Mich. 384), where a written promise payable to the order of J. V. Mehling estate was held to be a good note, and *McKinney v. Harter*, (7 Blackf. 385), which was substantially similar. See also *Storm v. Stirling*, (3 El. & Bl. 832; *s. c. sub. nom. Cowie v. Stirling*, 6 El. & Bl. 333); *Yates v. Nash* (8 C. B. N. S. 581): where a promise to the officer for the time being of a society was held too indefinite, though the general rule as applied in other cases was recognized.

In the case before us, the promise was to pay to F. B. Bridgman's estate, or order. He was dead, and administrators had been appointed. There could be no doubt that the promise was intended to be one of which the administrators could avail themselves. They were in existence, and were ascertainable. If the administrators of his estate had been made the payees, without naming them, there can be no shadow of question that it would have been sufficient. It savors of too much

refinement to hold that the instrument was not a valid promissory note for want of a sufficiently definite payee.

This is the only question presented by the bill of exceptions.

Exceptions sustained.<sup>1</sup>

(b) *Payee may be (1) one not maker, drawer or drawee.*

[This is the normal case and calls for no special illustration.]

(b) *Payee may be (2) the drawer or the maker.*

§ 27. *COMMONWEALTH v. BUTTERICK*, 100 Mass. 12.—1868. “Three months after date pay to the order of myself eight hundred and fifty dollars, value received, and charge the same to the account of your obedient servant, J. S. Butterick. To J. S. Butterick, Sterling, Mass.” [On the face]: “Payable at the Lancaster N. Bank, J. S. Butterick.” [Indorsed]: “J. S. Butterick.” “J. M. Stevenson.” Indictment for forging the name of J. M. Stevenson to a bill of exchange.

FOSTER, J. — “Upon principle, as well as by the authorities cited by the attorney-general, we entertain no doubt that an order for the payment of money, drawn by one in his own favor on himself, and by himself accepted and indorsed, may be treated as a bill of

<sup>1</sup> A promissory note payable “to the order of the estate of A.” is payable to a fictitious payee where there is no such legal entity as the “Estate of A.” and if negotiated by the maker is to be treated as a note payable to bearer. *Levisohn v. Kent & Stanley Co.*, 87 Hun (N. Y.), 257. See Neg. Inst. L., § 28, subsec. 3. — H. [See criticism of this case by Mr. McKeehan (41 Am. Law Reg., N. S., p. 451) and by Mr. Crawford (Neg. Inst. Law, 3d ed., p. 21). — C.]

[In *Adams v. King*, 16 Ill. 169, a note payable “to the administrators of Abner Chase, deceased,” was held negotiable on demurrer. “The general rule in relation to bills of exchange and promissory notes requires that the person to whom they are made payable, shall be specified. (Chit. on Bills, 156). But this may be done without inserting the name; for that is certain, which may be rendered certain; and if the payee be so certainly described or referred to, as to be easily ascertained by allegations and proofs, the promise will be valid. The declaration avers that plaintiffs were ‘administrators of Abner Chase, deceased,’ at the time these promises were made; and that they were made to them personally, by that designation and description. These are traversable allegations, and must be denied under oath, by our statute as settled in *Frye v. Menkins* (15 Ill. 339). They have not sued as administrators, and it was therefore unnecessary to aver that they were administrators at the time this action was commenced. The demurrer admits the promise to be to defendants personally, by a descriptive phraseology.” SCATES, J., at p. 170. — C.]

A check drawn payable to a deceased person is void. *U. S. v. First Nat. Bk.*, 82 Fed. R. 410. — H.



exchange, and so described in an indictment. Such instruments are well known in commerce; especially in the case of mercantile firms which have branches in different cities, all composed of the same partners. Perhaps such a bill may also be declared upon as a promissory note. But we agree with the court of Queen's Bench in the latest English case on the question, decided in 1852, that 'it is not unjust to presume that it was drawn in this form for the purpose of suing upon it either as a promissory note or a bill of exchange.' (*Lloyd v. Oliver*, 18 Q. B. 471.) It is sufficient that the instrument was in the form of, and purported to be, a bill of exchange; and the defendant might be convicted of forging this indorsement, if all the other names were also forged or were those of fictitious personages."

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(b) *Payee may be (3) the drawee.*

§ 27

WITTE v. WILLIAM.

8 SOUTH CAROLINA, 290. — 1876.

ACTION by indorsee against drawer of a bill, drawn upon J. & J. D. Kirkpatrick payable to the order of the said J. & J. D. Kirkpatrick and by them indorsed to plaintiff. The trial court held that the instrument was not a bill of exchange and hence was open to a defense of fraud.

MOSES, C. J., (after disposing of another matter). The presiding judge, without any exception to the report of the referee to the character of the instrument sued upon, holds that one of them is not a bill of exchange because drawn on J. & J. D. Kirkpatrick, requesting the drawees to pay to their own order a certain sum of money, while a bill of exchange presupposes a duty on them to pay to some other than themselves. The only authority relied on in support of the position is found in Story on Bills, § 35. With the accustomed deference that is due to so distinguished a jurist as the late Mr. Justice Story, we are obliged to say that the proposition is not sustainable on either principle or authority. We are the more emboldened to say so because, in the same section, the learned writer thus expresses himself: "Nay, the drawer may at once become drawer, payee and drawee; as, for example, if he should draw a bill on himself, payable to his own order at a particular place, naming no drawee, and then should indorse it over, the indorsee might sue him as acceptor of the bill or as maker of a promissory note, at his election." And in section 36, he says, "the drawee and the payee may be also one and the same person." But in *Wildes v. Savage*, (1 Story, 29), he lays down the rule in direct contradiction to his affirmation cited by the pre-

siding judge to sustain his own conclusion. We quote the very words of Justice Story: "The argument is that the bill is not a regular bill of exchange because it is drawn by Russell & Co., payable to Wildes & Co., who are the drawees of the bill. \* \* \* An instrument is not the less a bill of exchange because all the parties to it in the character of drawers, payees and drawees, are not different persons. A bill drawn by a person payable to his own order has always been deemed to be a bill of exchange in the commercial sense of the phrase, and it would not cease to be such a bill if it should be indorsed by the drawer payable to the drawee. Now, such a bill so indorsed differs in nothing substantially from the present bill. In truth, where the bill is negotiable, and contains a drawer, a payee and a drawee, it is, in a commercial sense, a bill of exchange, although one or more of the parties shall fill a double character."

Mr. Chitty, in his work on Bills (page 25), says: "It is not, however, necessary that there should be three parties to a bill; there are sometimes only two; as where a person draws on another payable to his own order; and, indeed, a bill will be valid where there is only *one* party to it, for a man may draw on himself payable to his own order. In such cases, however, the instrument may be treated as, in legal operation, a promissory note, and declared on accordingly, but in practice it is usual to declare upon the instrument as if it were a bill not admitting the identity of drawer and drawee." The objection thus taken by the presiding judge to one of the bills cannot prevail, and, in conformity with our views herein expressed, the judgment must be set aside and the case remanded to the Circuit Court for a new trial. It is so accordingly ordered.

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(b) *Payee may be (4) two or more payees jointly.*

§ 27

GORDON v. ANDERSON.

83 IOWA, 224. — 1891.

THE plaintiff, as assignee for value and before maturity of two promissory notes, executed by defendants, payable "to Charles R. Whitesell *et al.* or order," asks judgment thereon, and the foreclosure of a mortgage given by the defendants to secure the same. The defendants answered that the notes and mortgage were executed for part of the purchase price of certain real estate sold to them by Charles R., Emily, J. L., and Phebe J., Whitesell, and for which Charles R., J. L., and Phebe J. executed to the defendants a warranty deed warranting the title to said property. The answer alleges a breach of the covenants of warranty, and damages in the sum of five hundred dollars, which the defendants ask as an offset against the notes. The plaintiff demurred to the answer on the ground that the

damages set up were claims against the payee of the notes, and no defense against the notes, in his hands, he being a purchaser before maturity, and without notice; and that the answer sets up no defense to said notes, as against the plaintiff, he being an innocent holder for value before maturity. The demurrer was sustained, and the defendants electing to stand upon their answer, and refusing to plead over, a decree was entered for the plaintiff, from which the defendants appeal.

GIVEN, J. The discussion is addressed entirely to the question whether the promissory notes sued upon are negotiable. It will be observed that they are promises "to pay to Charles R. Whitesell *et al.* or order." The discussion is as to the construction to be given to the words "*et al.*," and the effect thereof. The words as here used evidently mean "and others." Therefore, the notes are payable to Charles R. Whitesell and others or order, without designating who the others are. To learn what qualities are essential to a negotiable promissory note, says Mr. Parsons, in his work on Notes and Bills, (page 30), "we must bear in mind the purpose of the note, and of the law in relation to it. This is simply that the note may represent money, and do all the work of money in business transactions. For this purpose the first requisite—that thing which includes all the rest—is certainty." Certainty, says the author, as to the person who shall receive the money, the person or persons who are to make the payment; the amount to be paid, and the time when payment is to be made. In Story on Promissory Notes (§ 35), it is said: "In instruments designed for circulation, it is of the highest importance to know to whom its obligations apply, and from whom a title can securely be derived." In *Smith v. Marland*, (59 Iowa, 645, 649), it is said: "The qualities essential to a negotiable promissory note are that it shall possess certainty as to the payor, the payee, the amount, the time of payment, and the place of payment." Such is the rule uniformly laid down in all the authorities, and it does not require further citations. This case must not be confounded with notes payable in the alternative, as "to A. or B.;" it is a promise to pay to Charles R. Whitesell and others jointly. Neither must it be confounded with notes payable to bearer, without naming any payee, nor with the cases in which it has been held that whoever legally owns such a note may recover thereon. These notes being promises to pay Charles R. Whitesell and others jointly, Whitesell could not alone transfer them so as to convey the interest of the other payees any more than if they had been named in the notes. A note made to several persons not partners can only be transferred by the joint action of all of them. (*Ryhiner v. Feickert*, 92 Ill. 305); "and neither payee can, of course, indorse the names of the others without special authority." (*Randolph on Commercial Paper*, § 155.)

The appellee contends that these notes are in accord with the provision of section 2085 of the Code. Turning to section 2082, we see that notes in writing, signed by the person promising "to pay to another person or his order or bearer, or to bearer only, any sum of money, are negotiable by indorsement or delivery." It will be observed that the promise must be to another person or his order or bearer, and does not dispense with the certainty of which we have been speaking as to who that other person is. Section 2085 is as follows: "Instruments by which the maker promises to pay a sum of money in property or labor, or to pay or deliver property or labor, or acknowledges property or labor or money to be due to another, are negotiable instruments, with all the incidents of negotiability, whenever it is manifest from their terms that such was the intent of the maker; but the use of the technical words 'order' or 'bearer' alone will not manifest such intent." Here, again, the promise must be to another, and there is nothing in the section to modify the rule requiring certainty as to who that other is. It is true, as contended, that negotiable instruments may be transferred by indorsement or delivery; but that does not aid us in determining whether these particular instruments are negotiable. It is said that Charles R. Whitesell is the only payee named. That is true, but the notes show that he is not the only person to whom payment is to be made. If it be true, as alleged in the answer, that the other persons named, together with Charles R., are in fact payees of the notes, then, surely, Charles R. is not the only payee, and could not alone transfer them. Authorities are cited in support of the claim that, if any words are used which indicate that the maker intended that the notes should be negotiable, the law will give effect to that intention, as against him. It is a sufficient answer to say that, in view of the law which requires certainty in negotiable instruments as to who the payee is, the fact that it is left uncertain rather indicates an intention that the instrument should not be negotiable.

The appellee relies upon *Moore v. Anderson*, 8 Ind. 18. That note was payable to steamboat Juda and owners, and the court held that the word "owners," as it occurred in the note, sufficiently indicated a person, within the intent of the law. It is a familiar rule that, when a person is designated as payee, and a question arises as to who of several persons bearing the same designation was meant, evidence is admissible to show which is the payee. (*Parsons on Mercantile Law*, 88.) Under this rule it was admissible to show who was the owner of the steamboat, and hence the designation was sufficient. In *Grant v. Vaughan* (3 Burrows, 1516), it is held that a note payable "to ship Fortune or bearer is negotiable, under the rule that, if the name of payee be not the name of a person, as if it be the name of a ship, the instrument is payable to bearer." (See, also, *Parsons on Mercantile Law*, 89.) In each of these cases a person was designated as payee — in the one as the owner of the steamboat Juda; and in the other as

bearer. These notes are payable to Charles R. Whitesell and others or order. The others are not designated by name or otherwise, and, therefore, it is uncertain "as to the persons who shall receive the money," uncertain "to whom its obligations apply, and from whom a title can securely be derived."

We think the District Court erred in sustaining the demurrer to the answer.

Reversed.

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(b) *Payee may be (5) one or some of several payees.*

§ 27

MUSSELMAN v. OAKES.

19 ILLINOIS, 81. — 1857.

DEMURRER to declaration overruled, and judgment for plaintiff.

CATON, C. J. The declaration in this case was upon an instrument purporting to be a promissory note, payable to "Olive Fletcher or R. H. Oakes," in an action brought by Oakes. The declaration was demurred to, the demurrer overruled, and judgment rendered in favor of the plaintiff below. This was erroneous. The instrument sued on was payable in the alternative to one or two persons, and for that reason is not a promissory note, and could not be sued on as such. It is indispensable to a promissory note that it not only must be for a sum certain, and payable at a certain time, and without condition, but it must also be payable to a certain person, either specified on the face of the note, or who may be certainly identified by extrinsic proof, not inconsistent with the face of the note, as assignee or bearer. Here the promise was to pay Fletcher or Oakes, but which, is uncertain; which of them had the right to receive the pay is not specified, and the legal right to the money is not vested in either. But this is a question of law too well settled by the books to require discussion, and I will only refer to *Story* on Prom. Notes (p. 40). The peculiarity of the note sued on was no doubt overlooked by the Circuit Court.

Judgment reversed.<sup>2</sup>

The judgment must be reversed.

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<sup>2</sup> "Mr. Crawford illustrates the meaning of this subdivision by the following example: 'A draft payable to A, B, and C, or either of them or any two of them.' Crawford, p. 20. If this illustration correctly interprets the meaning of this subdivision — and Mr. Crawford's construction is entitled to great consideration — the existing law has been changed because the statute recognizes an instrument payable to two payees in the alternative as negotiable whereas, under the law merchant an instrument payable to two persons in the alternative is not negotiable. *Musselman v. Oakes*, 19 Ill. 81; *Carpenter v. Farnsworth*, 106 Mass. 561; *Walrad v. Petrie*, 4 Wend. 575; *Blanckenhagen v. Blundell*, 2 B. & Ald. 417. But see *Watson v. Evans*, 1 Hurl. & Colt. 663; *Spaulding v. Evans*, 2 McLean, 139, Fed. Cas. 13,216; *Record v. Chisum*, 25 Tex. 348." Bunker's Neg. Inst. Law, p. 48. — C.

## § 27 WATSON, SOUTHERN AND MAYER v. EVANS.

1 HURLSTONE &amp; COLTMAN (EXCH.) 662. — 1863.

DECLARATION. That the defendant and William Patrick Evans and George Thomas Evans, on, etc., made their joint and several promissory note in the words, letters, and figures, following, and as follows, that is to say: —

£100.

LEAMINGTON, Dec. 2d, 1858.

On demand, we jointly and severally promise to pay Messrs. Joseph Watson, Thomas Southern, and Daniel Mayer, or to their order, or the major part of them, the sum of one hundred pounds, with lawful interest, for value received.

GEORGE EVANS.

WILLIAM PATRICK EVANS.

GEORGE THOMAS EVANS.

That the said makers, by the said names following in the said note contained, that is to say, Joseph Watson, Thomas Southern, and Daniel Mayer, meant the plaintiffs; but the defendant and the said other makers did not, nor did either of them, pay the said note.

Demurrer, and joinder therein.

*Hayes Serjt.* (C. E. Coleridge with him), in support of the demurrer. The document is void for uncertainty. Is the money to be paid to the three payees, or any two of them? Again, do the words “or the major part of them” refer to the payment or the indorsement, or to both? [POLLOCK, C. B. — Is it not a promise to pay to the three persons or their order, or the order of the major part of them?] Suppose two of them said “pay to us;” and the other said “pay all three.” If two alone sued, could the maker plead in abatement the non-joinder of the third? Assuming that the promise is to pay all three provided they agree, if not to pay any two of them, suppose they all disagree, and each says, “Do not pay to the other.” [MARTIN, B. — Payment to one of several joint creditors is a payment to all.] The general rule of law is qualified by the express words of the contract. In *Bayley* on Bills, (p. 34, 5th ed.), it is laid down that “uncertainty as to the person to whom the payment shall be made will prevent the document from being a bill or note; as making it payable to A. or B.” The authority there cited is *Blanckenhagen v. Blundell*, (2 B. & Ald. 417), where Abbott, C. J., and Holroyd, J., agreed that such a document cannot be a promissory note within the statute 3 and 4 Anne, c. 9, the promise being conditional, to pay A. only if the maker had not paid B. [MARTIN, B. — Here the three payers are suing, which distinguishes the case from *Blanckenhagen v. Blundell*.] Who is to indorse the notes, the three or any two of them? [MARTIN, B. — The words “or to their order, or the major part of them,” mean the order of all three or of any two of them. The words “or the major part of them,” must refer to the last antecedent order. WILDE, B. — It is “I

promise to pay to all three or their order, but I allow any two to sign for them all."'] If the indorsement may be made by the three, or any two of them, *Blanckenhagen v. Blundell* is an authority that the document is not a promissory note within the statute 3 and 4 Anne, c. 9. [MARTIN, B. — There cannot be any doubt in this case, as the three payees are suing. In the Author's Life, prefixed to the 9th edition of Noy's Maxims by Bythewood, p. viii., the following anecdote is related: "Three glaziers at a fair left their money with their hostess while they went to market; one of them returned, received the money and absconded; the other two sued the woman for delivering what she received from the three before they all came to demand it together. The cause was clearly against the woman, and judgment was ready to be pronounced when Mr. Noy, not being employed in the cause, desired the woman to give him a fee, as he could not plead in her behalf unless he was employed; and, having received it, he moved in arrest of judgment that he was retained by the defendant, and that the case was this: the defendant had received the money from the three together, and was not to deliver it until the same three demanded it; that the money was ready to be paid whenever the three should demand it together. This motion altered the whole proceedings."']

*Mellish* appeared for the plaintiffs but was not called upon to argue.

PER CURIAM. There must be judgment for the plaintiffs.

Judgment for the plaintiffs.

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§ 27 NOXON v. SMITH, 127 Mass. 485. — 1879. SOULE, J. The instrument sued on is properly described as a promissory note. Though it purports to be payable to "the trustees of the Methodist Episcopal Church or their collector," the payee is not therefore uncertain, and the instrument does not come within the class of cases in which instruments otherwise in the form of promissory notes are held not to be promissory notes because made payable in the alternative to either of two persons named. (*Osgood v. Pearsons*, 4 Gray, 455.) That rule applies to cases in which, so far as the instrument shows, the two persons named as alternative payees are strangers to each other. It does not apply when the instrument discloses the fact that one of the two persons named is named as agent for the other to receive the money. (*Holmes v. Jaques*, L. R. 1 Q. B. 376.) In the case at bar, it is evident that "their collector" is merely a person authorized by the payee to receive the money in its behalf.<sup>3</sup>

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<sup>3</sup> A note payable "to M. K. or heirs," is sufficiently definite as to the payee. *Knight v. Jones*, 21 Mich. 161. But not one payable "to C. W. et al." *Gordon v. Anderson*, 83 Ia. 224; ante, p. 115. — H.

(b) *Payee may be (6) the holder of an office for the time being.*

## § 27

DAVIS v. GARR.

6 NEW YORK, 124. — 1851.

ACTION on promissory notes payable to "Joseph M. White, Charles A. Davis, and Louis McLane, trustees of the Apalachicola Land Company, or their successors in office, or order." Judgment for plaintiffs.

GARDINER, J. The first objection presented by the pleadings on the part of the defendants is, that the written instruments set forth in the declaration are payable to the *trustees* therein named or *their successors in office*, and that the uncertainty as to which of the two the payment is to be made invalidates them as promissory notes, though not as agreements.

I am unable to perceive any such contingency in the contracts. If the plaintiffs are to be considered as the representatives of a corporation, and the suit instituted for the benefit of their principal, the payment must be made to them, as trustees. If their term of office expired before the commencement of the suit, then, and in that event only, would a right of action enure to their successors. There never was a time, consequently, when the maker of the notes could discharge himself by a payment made at his election, to these plaintiffs, or their successors.

The term successors, implies one who takes a place that another has left.

It might be as reasonably contended, that the payee was contingent, where a note was made payable to A. or his executors, or administrators, etc.

It has been determined that an undertaking to pay C. or D., or his or their order, is not a promissory note, because payable to either of the payees, and that only on the contingency of its not being paid to the other. (*Story on Prom. Notes*, § 37; 4 Wend. 575; 2 B. & Ald. 417.) The distinction between those cases (even if the doctrine thereby established is sound) and the present, is, that the contingency in them was apparent on the face of the instrument. Here there was no uncertainty in the contract, when the notes were made, or became payable; the ambiguity, if any, would arise from a change of trustees after the note took effect as a perfected contract.

Secondly. If the plaintiffs were not the representatives of a corporation, as the defendant insists, they could sustain the action in their own name; the word "trustees," would be merely a designation of the persons, and the phrase "their successors," may be rejected as surplusage. It has been decided that a note payable to a trustee, or agent, or executor, will maintain a suit in the name of the person mentioned. (3 Harrington, 385; 3 Mass. R. 103; 2 Eng. [Ark.] R. 382. And see 9 John. 334; 8 Cowen, 31, and cases there



cited. I think, therefore, that these contracts are promissory notes, and consequently negotiable.

A majority of the court concurred in the foregoing opinion.

Foot, J., dissented, on the ground that the instruments declared upon were not promissory notes, there being a contingency as to the persons to whom payment was to be made.

Judgment affirmed.

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### 3. PAYABLE TO BEARER.

(a) *Payable to person named or bearer.*

## § 28

### PUTNAM v. CRYMES.

1 McMULLAN'S LAW (S. C.) 9. — 1840.

THE plaintiff in this case was not the original payee, but held the note by transfer to himself by delivery. The note was made payable to Mancil Owens or *holder*; the plaintiff declared as *holder*, and defendants demurred on the ground that the holder could not sue without a written assignment. I regarded *holder* as synonymous with *bearer* and overruled the demurrer. Appeal by defendants on the ground that the demurrer should have been sustained.

*Curia, per BUTLER, J.* The word bearer is usually inserted in a negotiable note, transferable by delivery. But without it, the maker of a note may make it transferable by delivery, either by circumlocution, or using a word of precisely the same import. As if a note were made payable to A. B. or to any one to whom he may deliver it; or to any one who might hold the same by delivery. In both cases the bearer would be sufficiently meant and designated, although the word was not used. If it was the intention of the maker to make it payable to any one who acquires possession by delivery, he has no right to complain when it is presented to him without a written transfer. *Holder* is a word of the same import as bearer, and both may acquire a title by lawful delivery, according to the terms of the contract. All the law requires is, that the paper must have negotiable words on its face, showing it to be the intention to give it a transferable quality by delivery; otherwise the instrument must be transferred by written indorsement, if payable to order; or sued on by the original payee, if there are no negotiable words at all.

The decision below is affirmed; the whole court concurring.<sup>4</sup>

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<sup>4</sup> A bill or note payable "to bearer," or "to A. or bearer," is negotiable by delivery without indorsement. *Pierce v. Crafts*, 12 Johns. (N. Y.) 90; *Truesdell v. Thompson*, 12 Met. (Mass.) 565. See Neg. Inst. L., § 60, *post.* — H.

(b) *Payable to order of fictitious person.*

## § 28

## ARMSTRONG v. NATIONAL BANK.

46 OHIO STATE, 512. — 1889.

ACTION by plaintiff to recover \$450 due her on a deposit. She had drawn a check on defendant bank payable to "William Brown," who was represented to her by one Grimes to be an actual person, and had delivered it to Grimes who procured it by fraud. Grimes indorsed on it the name "William Brown" and defendant, after prudent inquiry as to Grimes' identity, paid it. "William Brown" was a fictitious person. Judgment at Common Pleas for plaintiff; reversed at Circuit. Plaintiff appeals from judgment of reversal.

MINSHALL, C. J. This case is in its general features analogous to that of *Dodge v. The National Exchange Bank*, (20 Ohio St. 234), and should, we think, be ruled by it. \* \* \*

The fact that the check was made payable to a person that had no existence does not alter the rights of the plaintiff as against the bank, for she supposed that Brown was a real person, and intended that payment should be made to such person. The doctrine that treats a check or bill made payable to a fictitious person as one made payable to bearer, and so negotiable without indorsement, applies only where it is so drawn with the knowledge of the parties. (*Tatlock v. Harris*, 3 T. R. 174, 180; *Vere v. Lewis*, Id. 182; *Minet v. Gibson*, Id. 481; s. c., in the House of Lords on error, *Gibson v. Minet*, 1 H. Bl. 569; *Collis v. Emett*, 1 H. Bl. 313; *Gibson v. Hunter*, 2 H. Bl. 187.) The doctrine that a bill payable to a fictitious person or order, is equivalent to one payable to bearer, had its origin in these cases, which all grew out of bills drawn by Levisay & Co., bankrupts, payable to a fictitious person or order, and were accepted by Gibson & Co.; but it will be noticed that the holding in each case was upon the express ground, that the acceptor knew at the time of his acceptance that the bill was payable to a fictitious person; and but for this fact the fictitious indorsement would have been held to be a forgery — some of the judges expressing a doubt whether it was not so, although its character was known to the acceptor. (3 T. R. 181.) These cases will be found reviewed in a note to *Bennett v. Farrell* (1 Campb. 130). It was held in this case that a bill made payable to a fictitious person or order, is neither payable to the order of the drawer or bearer, but is completely void. But in an addendum to the case (at page 180c of the report), Lord Ellenborough observes that this holding must be taken with this qualification: "unless it can be shown that the circumstance of the payee being a fictitious person was known to the acceptor." The rule with this qualification is stated as the law in *Byles on Bills*, 73. (See also, to the same effect, *Forbes v. Espy*, 21 Ohio St. 483; 1 Rand. Com. Paper,

§§ 162, 163, 164; 2 Parsons N. & B. 591, and note a.) Mr. Daniel, in his work on Neg. Inst. (sec. 139), states the rule to be general, but, as shown by Mr. Randolph, the cases do not bear out the text. (1 Rand. Com. Paper, § 164, note 4.) And upon principle we do not see how the law could be held to be otherwise. For if the fictitious character of the payee is unknown to the drawer, whoever indorses the paper in that name with intent to defraud, perpetrates a forgery and the indorsement is void, a general intent to defraud being sufficient to constitute the offense.

[The court here discusses and distinguishes *Lane v. Krekle*, 22 Iowa, 399; *Phillips v. Im Thurn*, 18 C. B. N. S. 694; *Rogers v. Ware*, 2 Neb. 29; *Ort v. Fowler*, 31 Kans. 478.]

If the drawer of a check, acting in good faith, makes it payable to a certain person or order, supposing there is such a person, when in fact there is none, no good reason can be perceived why the banker should be excused if he pay the check to a fraudulent holder upon any less precautions, than if it had been made payable to a real person; in other words, why he should not be required to use the same precautions in the one case as in the other; that is, determine whether the indorsement is a genuine one or not. The fact that the payee is a non-existing person does not increase the liability of the bank to be deceived by the indorsement. The fact is that an ordinarily prudent banker would be less liable to be deceived into a mistaken payment by a fictitious indorsement such as this was, than by a simple forgery.<sup>5</sup> The determination of the character of any indorsement involves the ascertainment of two things: (1) the identity of the indorser; and (2) the genuineness of his signature; and no careful banker would pay upon the faith of the genuineness of any name, until he had fully satisfied himself both as to the identity of the person and the genuineness of his signature. Now, a careful banker may be deceived as to the signature of a person with whose identity he may be familiar; but he is less liable to be deceived where both the signature and the person whose signature it purports to be, are unknown to him. In making the inquiry required in such case to warrant him in acting, he will either learn that there is no such person, or that no credible information can be obtained as to his existence, which, with an ordinarily prudent banker, would be the same as actual knowledge that there is no such person, and he would withhold payment, as he would have the right to do in such case. But still, if he should be deceived as to the existence of the person, he would, nevertheless, require to be satisfied as to the genuineness of the signature. Of this, however, he could not be through his skill in such matters and on which bankers ordinarily rely, for he would be

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<sup>5</sup> Followed on this point by *Jordan Marsh Co. v. National Shawmut Bank*, 201 Mass. 397, 409. — C.

without any standard of comparison, and he could have no knowledge of the handwriting of the supposed person, for there is no such person. So that, if he acts at all, it must be upon the confidence he may place in the knowledge of some other person, and if he choose to act upon this, and make, instead of withholding, payment, he acts at his peril and must sustain whatever loss may ensue. It is a saying frequently repeated in "The Doctor and Student," that "he who loveth peril shall perish in it." In other words, where a person has a safe way and abandons it for one of uncertainty, he can blame no one but himself if he meets with misfortune.

Judgment of the Circuit Court reversed, and that of the Common Pleas affirmed.<sup>6</sup>

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## § 28 BANK OF ENGLAND *v.* VAGLIANO BROTHERS.

L. R. 1891, APPEAL CASES (H. L.) 107.

Plaintiffs carried on a large business in London as foreign bankers. Vucina, a banker in Odessa, Russia, had had for twenty-nine years constant business relations with plaintiffs and his bills on plaintiffs were each year numerous and in the aggregate for very large amounts. On several occasions Vucina had drawn them to the order of C. Petridi & Co., a firm doing business in Constantinople.

Glyka was one of plaintiffs' clerks and had charge of the correspondence with persons residing in Russia. He forged the signature of Vucina to bills purporting to be drawn on the plaintiffs by Vucina to the order of C. Petridi & Co., and resembling those which Vucina was in the habit of drawing on the plaintiffs, and placed among the plaintiffs' correspondence counterfeit letters of advice with respect to these bills resembling those ordinarily received from Vucina. By these means Glyka procured the genuine acceptances of the plaintiffs to the bills which he had forged. He then forged on the bills indorsements purporting to be those of C. Petridi & Co., the payees named therein, and was paid by the defendants across the counter the amounts for which the bills were drawn.

Section 7, subsec. 3, of the English Bills of Exchange Act reads:

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<sup>6</sup> Accord: *Shipman v. Bank*, 126 N. Y. 318. See discussion of this case in *Phillips v. Mercantile Nat. Bk.*, 140 N. Y. 556, *post*, p. 135. In *Jordan Marsh Co. v. Nat. Shawmut Bk.*, 201 Mass. 397, it is said that "The case of *Shipman v. Bank*, 126 N. Y. 318, is almost identical in its leading features with the case before us, and the decision of it fully covers the conclusion which we have reached." P. 410.

See also *Boles v. Harding*, 201 Mass. 103, and *Seaboard Nat. Bk. v. Bk. of America*, 193 N. Y. 26, reported in 22 L. N. S. 499 with note. Extracts from this note will be found printed herein at p. 141. — C.

“Where the payee is a fictitious or non-existing person the bill may be treated as payable to bearer.”<sup>7</sup>

Plaintiffs now seek to recover from the defendants the amounts so paid, alleging that they were wrongfully and without their authority debited to their account.

Case tried before CHARLES, J., without a jury, who found for the plaintiffs. 22 Q. B. D. 103. This judgment was affirmed by the Court of Appeal (23 Q. B. D. 243), and the defendants thereupon appealed to the House of Lords.

LORD HERSHELL. My Lords, I propose to deal at the outset with the question of the construction of the Bills of Exchange Act, which gave rise to a difference of opinion in the court below. \* \* \*

The conclusion at which the majority of the Court of Appeal arrived with reference to the construction of the sub-section of the Bills of Exchange Act with which your Lordships have to deal is thus stated: “The word ‘fictitious’ must in each case be interpreted with due regard to the person against whom the bill is sought to be enforced. If the drawer is the person against whom the bill is to be treated as a bill payable to bearer, the term ‘fictitious’ may be satisfied if it is fictitious as regards himself, or in other words, fictitious to his knowledge. If the obligations of the acceptor are in question, and the acceptor is the person against whom the bill is to be so treated, ‘fictitious’ must mean fictitious as regards the acceptor, and to his knowledge. Such an interpretation is based on good sense and sound commercial principle.”

The conclusion thus expressed was founded upon an examination of the state of the law at the time the Bills of Exchange Act was passed. The prior authorities were subjected by the learned judges who concurred in this conclusion to an elaborate review, with the result that it was established to their satisfaction that a bill made payable to a fictitious person or his order was, as against the acceptor, in effect a bill payable to bearer, only when the acceptor was aware of the circumstance that the payee was a fictitious person, and further, that his liability in that case depended upon an application of the law of estoppel. It appeared to those learned judges that if the exception was to be further extended, it would rest upon no principle, and that they might well pause before holding that sec. 7, sub-sec. 3, of the statute was “intended not merely to codify the existing law, but to alter it and to introduce so remarkable and unintelligible a change.”

My Lords, with sincere respect for the learned judges who have taken this view, I cannot bring myself to think that this is the proper way to deal with such a statute as the Bills of Exchange Act, which was intended to be a code of the law relating to negotiable instruments. I think the proper course is in the first instance to examine

<sup>7</sup> Notice the different reading of the Neg. Inst. Law, § 28, subd. 3. — C.

the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view.

If a statute, intended to embody in a code a particular branch of the law, is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and that the very object with which it was enacted will be frustrated. The purpose of such a statute surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, by roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior decisions, dependent upon a knowledge of the exact effect even of an obsolete proceeding such as a demurrer to evidence. I am, of course, far from asserting that resort may never be had to the previous state of the law for the purpose of aiding in the construction of the provisions of the code. If, for example, a provision be of doubtful import, such resort would be perfectly legitimate. Or, again, if in a code of the law of negotiable instruments words be found which have previously acquired a technical meaning, or been used in a sense other than their ordinary one, in relation to such instruments, the same interpretation might well be put upon them in the code. I give these as examples merely; they, of course, do not exhaust the category. What, however, I am venturing to insist upon is, that the first step taken should be to interpret the language of the statute, and that an appeal to earlier decisions can only be justified on some special ground.

One further remark I have to make before I proceed to consider the language of the statute. The Bills of Exchange Act was certainly not intended to be merely a code of the existing law. It is not open to question that it was intended to alter, and did alter it in certain respects. And I do not think that it is to be presumed that any particular provision was intended to be a statement of the existing law, rather than a substituted enactment.

Turning now to the words of the sub-section, I confess they appear to me to be free from ambiguity. "Where the payee is a fictitious or non-existent person" means, surely, according to ordinary canons of construction, in every case where this can, as a matter of fact, be predicated of the payee.

I can find no warrant in the statute itself for inserting any limitation or condition. I am putting aside for the present the question by whom a bill answering the description of the sub-section may be treated as payable to bearer, and I am accepting, too, for the moment, the meaning attributed by the majority of the Court of Appeal to

the word "fictitious," viz., a creation of the imagination, confining myself to the question in what cases a bill purporting on the face of it to be payable to order may be treated as payable to bearer. I find it impossible, without doing violence to the language of the statute, to give any other answer than this: — In all cases in which the payee is a fictitious or non-existent person. The majority of the Court of Appeal read the section thus: Where the payee is a fictitious or non-existent person, the bill may, as against any party who had knowledge of the fact, be treated as a bill payable to bearer. It seems to me that this is to add to the words of the statute and to insert a limitation which is not to be found in it or indicated by it. It is said that when the acceptor is the person against whom the bill is to be treated as payable to bearer, " 'fictitious' must mean fictitious as regards the acceptor, and to his knowledge." With all respect, I am unable to see why it must mean this. I confess I cannot altogether follow the meaning of the words fictitious "as regards" the acceptor. I have a difficulty in seeing how a payee, who is in fact a "fictitious" person in the sense in which that word is being used, can be otherwise than fictitious as regards all the world — how such a payee can be "fictitious" as regards one person and not another. The truth is the words, "as regards" the acceptor, are treated as equivalent to the words, "to the knowledge of" the acceptor. But I do not think these expressions are synonymous. It seems to me that to import into the statute after the words "fictitious person" the words "as regards" the acceptor or drawer, as the case may be, and then to interpret those words as meaning "to the knowledge of," only tends to obscure the fact that the condition that the payee must be fictitious to the knowledge of the person sought to be charged as upon a bill payable to bearer is being introduced into the enactment.

For the reasons I have given I find myself compelled to the conclusion, notwithstanding my respect for those who have expressed a contrary view, that in order to establish the right to treat a bill as payable to bearer it is enough to prove that the payee is in fact a fictitious person, and that it is not necessary if it be sought to charge the acceptor to prove in addition that he was cognizant of the fictitious character of the payee.

My Lords, if the conclusion which I have indicated as being, in my opinion, the sound one, involved some absurdity or led to some manifestly unjust result, I might perhaps, even at the risk of straining the language used, strive to put some other interpretation upon it. But I cannot see that this is so, or that the interpretation I have adopted does any violence to good sense, or is otherwise than in accordance with sound commercial principle. I will assume that as the law stood at the time the Bills of Exchange Act was passed, a bill drawn to the order of a fictitious payee could have been treated

as a bill payable to bearer only as against a party who knew that the payee was fictitious. This decision even was arrived at little more than a century ago, and was dissented from by distinguished judges, and it is obvious from the observations of Lord Ellenborough in *Bennett v Farnell* (1 Camp. 130, 180, c.) that by some eminent lawyers at least it was regarded rather as a departure from strict principle, which ought not to be further extended than as an embodiment of sound commercial principle.

But is it impossible to take any step beyond this without violating sound principle and working injustice? Let me draw attention for a moment to the relative position and rights of the drawer and acceptor of a bill of exchange. A drawee who accepts a bill does so either because he has in his hands moneys of the drawer, or expects to have them before the bill falls due, or because he is willing to give the credit of his name to the drawer, and to make him an advance by payment of his draft. It is immaterial to the acceptor to whom the drawer directs him to make payment; that is a matter for the choice of the drawer alone. The acceptor is only concerned to see that he makes the payment as directed, so as to be able to charge the drawer. It is in truth only with the drawer that the acceptor deals; it is at his instance that he accepts; it is on his behalf that he pays; and it is to him that he looks either for the funds to pay with, or for reimbursement if he holds no funds of the drawer at the time of payment.

In the ordinary case, where the payee designated in the bill is a real person intended by the drawer to receive payment, either by himself or by some transferee, the acceptor can only charge the drawer, if he pays the person so designated, or some one deriving title through him. If payment be made to any other person, the drawer's liability on the bill is not discharged by payment; he will or may remain liable to the real payee, or those claiming under him, and the acceptor having paid otherwise than according to the directions of the drawer cannot justify the use of his funds in making the payment, or claim to be reimbursed by him. But now suppose the drawer inserts as payee the name of a fictitious person, requests the drawee to accept a bill so drawn, indorses the payee's name, and puts the bill into circulation. He certainly intended it to obtain currency and to be paid at maturity, and he as certainly did not intend it to be paid only to the payee named, or some one deriving title through him. Nor, as it seems to me, can it reasonably be said that he intended to direct the drawee to pay such person and such person only.

What then is the position of a lawful holder of a bill so drawn? I do not understand it to be doubted that even before the Bills of Exchange Act such a holder could enforce payment of the bill against the drawer, for he not merely knew that the payee designated was a fictitious person, but was himself the author of the fiction. As against the drawer then such a bill could be treated as payable to bearer.



But if it cannot be so treated as against the acceptor, the holder, who, it may be, bought or discounted it on the faith of the acceptance, relying on the credit of the acceptor, and unwilling to trust to that of the drawer alone, is deprived of that upon which he relied, and of the liability which he regarded as his security for payment. The holder in such a case suffers wrong. Would any injustice result if the bill could, as against the acceptor also, be treated as payable to bearer? The drawer must be taken to have intended the bill to be paid by the acceptor at maturity — but to whom? Not to the fictitious payee, or some one claiming through him. Why not then to the bearer, who can hold the drawer liable upon the bill, and treat it as payable to him? And if it were the law that the acceptor was bound in such a case to pay the bearer, who would suffer? Not the drawer, for payment would have been made to a person who could compel him to make payment, and he could have no ground for complaint if the acceptor used his funds in thus discharging his liability on the bill, or in case he had not provided such funds if he were held liable to reimburse the acceptor. And how would the acceptor suffer in such a case? It was his object in accepting the bill to render himself liable to make payment to the person intended by the drawer to receive it, either out of moneys provided by him, or looking to him for reimbursement. His position under such circumstances would be precisely what it would have been if he had made payment to a real person designated as payee, or to those claiming under him. And it might, I think, fairly be said that he was making the payment in accordance with the intention of the drawer.

It may be that the right of the holder to treat such a bill, as against an acceptor ignorant of the fictitious character of the payee, as a bill payable to bearer, could not be established merely by an appeal to the law of estoppel, and that such estoppel would exist only against the drawer who knew that the payee was a fictitious person. I will assume that this was the law prior to the recent statute. But why should not the Legislature have intervened with a positive enactment imposing this liability upon the acceptor — an enactment which, it seems to me, would wrong no one, and would prevent a holder for value from suffering wrong? Estoppel is not the only sound principle upon which a law can be based. The law of estoppel was not thought to afford sufficient protection to those dealing with the apparent owner of goods. The Legislature deemed it necessary to intervene, and the Factors Acts were passed, each of which added something to the protection of persons so dealing. Why, then, should it be thought improbable that the Legislature should have created in the holder of a bill drawn payable to a fictitious person a new right against the acceptor? If I am correct in thinking that this added right would obviate and not entail injustice, that it would make the law more reasonable and bring it

more into conformity with the course of commercial transactions, I can see no reason for doubting that the Legislature so intended, if this be the plain, natural meaning of the words they have used, or for endeavoring so to construe the language as to find in it no more than a statement of the previous law.

\* \* \* \* \*

Even assuming, it is said, that where the payee is a "fictitious" person the bill may be treated as against the acceptor as a bill payable to bearer, the word "fictitious" is only applicable to a creature of the imagination, having no real existence, whilst in the present case "C. Petridi and Company" was the name of a firm having a real existence, so that the payee here cannot be termed a fictitious person.

[After discussing this proposition at great length the court concludes:]

It seems to me, then, that where the name inserted as that of the payee is so inserted by way of pretence only, it may, without impropriety, be said that the payee is a feigned or pretended, or, in other words, a fictitious person. Stress was laid upon the fact that the words of the statute are "where the payee is a fictitious person," and not "where the payee is fictitious." There is not, to my mind, any substantial difference in the meaning of the two phrases; and I cannot think that the Legislature intended the rights and liabilities arising upon mercantile instruments to depend upon nice distinctions such as this.

\* \* \* I have arrived at the conclusion that, whenever the name inserted as that of the payee is so inserted by way of pretence merely, without any intention that payment shall only be made in conformity therewith, the payee is a fictitious person within the meaning of the statute, whether the name be that of an existing person, or of one who has no existence, and that the bill may, in each case, be treated by a lawful holder as payable to bearer.

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Lords Halsbury, Watson, Bramwell, Macnaghten, Morris, Field, and the Earl of Selbourne, also delivered opinions.

Judgments of the Court of Appeal and of the Queen's Bench Division reversed and judgment entered for the defendants with costs here and below; cause remanded to the Queen's Bench Division.

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## § 28 MACBETH *v.* NORTH AND SOUTH WALES BANK.

[1906] 2 KING'S BENCH, 718.

One White, by falsely representing to the plaintiff that he had agreed to purchase from a man named Kerr certain shares then held by Kerr in a company, and that he had arranged to resell the shares at a profit,

induced the plaintiff to agree to assist him in financing the transaction. For this purpose the plaintiff drew a check on the Clydesdale Bank payable to Kerr or order for the amount of the purchase money, which was delivered to White in order that he might hand it to Kerr in payment for the shares. White forged Kerr's indorsement to the check, and paid it into his own account with the defendant bank, who credited him with the amount, and collected the money from the Clydesdale Bank. White had not agreed to buy any shares from Kerr and Kerr had at the time no shares in the company.

The plaintiff's claim was for damages for the conversion of the check or alternately for money had and received to the plaintiff's use.

BRAY, J., read the following judgment:

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The plaintiff was told that Kerr was an engineer formerly living at Bootle, but then near Manchester. That was true. He was told that Kerr had agreed to sell the 5,000 shares to White. That was untrue, and he in fact held no shares. There had been no such transaction, but the plaintiff believed the statements made to him, and made the cheque payable to Kerr in order that he and no one else should get the money. Can Kerr, under these circumstances, be said to be a fictitious payee? I will first examine the authorities. In *Vinden v. Hughes*, [1905] 1 K. B. 795, the facts were, in my opinion, indistinguishable from the present case. Vinden had a real person in his mind when he drew the cheque, although in fact the payee was not his creditor, as he supposed, and had had no transaction with him giving rise to such a debt. He had been deceived by his clerk, but he intended the payee and no one else to receive the money. WARRINGTON, J., held that the payee was not fictitious. He says: "It was not a mere pretense at the time he drew it. He had every reason to believe, and he did believe, that the cheques were being drawn in the ordinary course of business for the purpose of the money being paid to the persons whose names appeared on the face of those cheques." That seems to me to exactly fit the present case. Under ordinary circumstances I should consider myself bound by this decision, but it was pressed on me that WARRINGTON, J., had misread the judgments in the *Bank of England v. Vagliano*. I think, therefore, I ought to examine these judgments. What were the facts of that case? There was no real drawer; the bills had been drawn by Vagliano's clerk Glyka to make Vagliano think that they were real bills drawn in the ordinary course of business by customers who were entitled to ask Vagliano to accept them. In truth, the whole bills were fictitious, though Vagliano believed them to be real and accepted them. It was strongly urged that, inasmuch as it was the obligations of the acceptor which were in question, the payees could not be fictitious unless they were so to his knowledge, and the Court of Appeal so held; but the House

of Lords held the contrary. I think the real ground of their decision is to be found in Lord Herschell's judgment beginning near the bottom of p. 147. I have therefore to ask myself, is this the ordinary case where the payee designated in the bill "is a real person intended by the drawer to receive payment either by himself or by some transferee?" It seems to me that there can be but one answer to that question. Kerr was a real person intended by the plaintiff, the drawer, as I have found, to be the person who should receive payment. It is a fallacy to say that Kerr was fictitious because he had got no shares and had never agreed to sell any to White. The plaintiff believed he had, and intended him, and no one else, to receive the money. It seems to me that when there is a real drawer who has designated an existing person as the payee and intended that person should be the payee, it is impossible that that payee can be fictitious. I think the word "fictitious" implies that the name has been inserted by the person who has put it in for some dishonest purpose, without any intention that the cheque should be paid to that person only, and therefore it is that such a drawer is not permitted to say what he did not intend, viz., that the cheque shall be paid to that person only, and the only way of effecting this is to say that it shall be payable to bearer. It matters not, in my opinion, how much the drawer of the cheque may have been deceived if he honestly intends that the cheque shall be paid to the person designated by him. I think WARRINGTON, J., has not in any way misread the judgments in *Bank of England v. Vagliano*. I think his decision and mine are really founded on the principles laid down in that case, and in the result therefore I am of opinion that the three contentions raised by Mr. Isaacs fail, and that the plaintiff is entitled to recover the whole 11,250*l*.

This judgment was affirmed by the Court of Appeal, [1908] 1 K. B. 13, and an appeal was taken to the House of Lords.

### [1908] Appeal Cases, 137.

LORD LOREBURN, L. C.

\* \* \* \* \*

I adopt the language of BRAY, J.: "It seems to me that where there is a real drawer who has designated an existing person as the payee, and intends that that person should be the payee, it is impossible that the payee can be fictitious."

If the argument for the appellants were to avail, namely, that the payee was a fictitious person because White (who was himself no party to the cheque) did not intend the payee to receive the proceeds of the cheque, most serious consequences would ensue. It would follow, as it seems to me, that every cheque to order might be treated as a cheque to bearer if the drawer had been deceived, no matter by whom, into

drawing it. To state such a proposition is to refute it. Yet nothing short of this could establish the appellants' contention.

As to the authorities, I agree with the Court of Appeal in thinking that neither *Vagliano v. Bank of England* nor *Clutton v. Attenborough*, ([1897] A. C. 90) governs the present case. I will not discuss the former of those authorities beyond saying that it was not a case in which the drawer intended the payee to receive the proceeds of the bill. And in the latter authority the payee was a non-existent person whom no one either could or did mean to be the recipient of the cheque.

That being so, I think this appeal should be dismissed with costs.

Lord Robertson also delivered an opinion, and Lord Collins concurred.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.<sup>8</sup>

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## § 28 PHILLIPS *v.* MERCANTILE NATIONAL BANK.

140 NEW YORK, 556. — 1894.

ACTION by John E. Phillips, as receiver of the National Bank of Sumter, S. C., against the Mercantile National Bank of the city of New York. From a judgment of the General Term affirming a judgment at Circuit dismissing the complaint, plaintiff appeals.

GRAY, J. The plaintiff is the receiver of the National Bank of Sumter, in South Carolina, and through this action seeks to recover a balance alleged to be due on a deposit account with the defendant bank. The question presented by the record is whether certain twelve checks, drawn by the cashier of the Sumter bank, which were paid by the defendant bank, could properly be debited in account to the Sumter bank. Bartlett, its cashier, had drawn them upon the defendant for various amounts, some to the order of A. S. Brown, and some to the order of C. E. Stubbs. In the check book he would enter sometimes the real amount of the checks, and sometimes an amount much less than the checks actually were drawn for. The names of these payees were those of persons who actually resided in Sumter, and were dealers with the bank, but they knew nothing of these checks, and had no connection whatever with the transactions of the cashier in issuing these

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<sup>8</sup> See Mr. John D. Falconbridge's article entitled "Fictitious or non-existing payee" in the *Canada Law Journal* for April, 1907, p. 225, where the English and British colonial cases are admirably discussed and compared. In addition to the *Vagliano* and *Macbeth* cases, reported herein, the following cases are commented upon: *Clutton v. Attenborough*, [1897] A. C. 90; *Vinden v. Hughes*, [1905] 1 K. B. 795; *London Life Ins. Co. v. Molsons Bk.*, [1904] 8 O. L. R. 238; *City Bk. v. Rowan*. [1893] 14 N. S. W. R. 127. — C.

checks. Bartlett, after having drawn the checks, indorsed them in the name of the payee, making them payable to the order of some firm of stock brokers in New York, who collected them from the defendant. By subsequent manipulations of the books in his bank, Bartlett was able to prevent a discovery of his dishonest acts until after he had absconded, and the insolvency of the bank was disclosed. \* \* \*

We think the judgments below were right. Whether indorsing the check in the name of the payee therein was a forgery in the legal sense or not is not the important question. In a general sense, of course, the cashier did forge the payee's name, but that fact did not affect the title or rights of the defendant. *Coggill v. Bank*, 1 N. Y. 113. In the case cited, a bill was drawn upon the plaintiff to the order of one Truman Billings, and was discounted at a bank. The drawer had indorsed it with the name of the payee, Truman Billings, a person who in fact had no interest in the bill. It was held that the defendant in the case, who had accepted and paid the bill, held it by a good title. BRONSON, J., said: "As the payee had no interest, and it was not intended that he should ever become a party to the transaction, he may be regarded, in relation to this matter, as a nonentity; and it is fully settled that, when a man draws and puts into circulation a bill which is payable to a fictitious person, the holder may declare and recover upon it as a bill payable to bearer. In legal effect, though not in form, the bill is payable to bearer."

The case of *Shipman v. Bank*, 126 N. Y. 318, which was recently before us, did not decide any question inconsistently with what the courts below have decided.<sup>9</sup> There it had been found that the checks were signed by the firm in the belief that the names of the payees represented real persons entitled to receive the amounts of the checks, and with the intention that they should be delivered to real payees, and should not go into circulation otherwise than through a delivery to, and an indorsement by, the payees named. Bedell was their clerk, whose employment did not comprehend the drawing or indorsing of

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<sup>9</sup> In this case plaintiffs were depositors in defendant bank. They signed twenty-seven checks payable to certain persons designated by Bedell, a clerk in their employ, and entrusted these checks to Bedell for delivery to the payees respectively therein named, who were in good faith believed by the plaintiffs to be real persons, entitled to receive the amounts of said checks, respectively, from them. The defendant paid the checks to a third person, upon an indorsement thereon of the payees named, forged by Bedell, who converted the proceeds to his own use. The names of the payees written in sixteen of the checks were not the names of real but fictitious persons. The remaining checks were made payable to the order of real persons, whose indorsements were in every case forged by Bedell. Judgment for plaintiffs, the court holding that the checks "cannot be treated as payable to bearer unless the maker knows the payee to be fictitious and actually intends to make the paper payable to a fictitious person." P. 330. — C.

checks or drafts; and in indorsing upon the checks the names of the payees he committed the crime of forgery, because he was without authority in that respect, and did so with the intention to deceive his employers, the makers, and to put their checks in circulation for his account. That was a case wholly other than was made out here. It was stated in the Shipman case that the maker's intention is the controlling consideration which determines the character of the paper, and that the statutory rule which gives to paper drawn payable to the order of a fictitious person, and negotiated by the maker, the same validity as paper payable to bearer, applies only when such paper is put into circulation by the maker with knowledge that the name of the payee does not represent a real person. The principle of that decision is quite applicable to the case at bar. Though Bartlett selected, for the execution of his dishonest purposes, the names of persons who were dealers with his bank, it was, in legal effect, as though he had selected any names at random. The difference is that, by the methods resorted to, he averted suspicion on the part of the directors or other officers of his bank. The names he used were, for his purposes, fictitious, because he never intended that the paper should reach the persons whose names were upon it.<sup>1</sup> The transaction was one solely for the fraudulent purpose of appropriating his bank's moneys by a trick which his position enabled him to perform. Concededly, if the names of the payees were of fictitious persons, the Sumter bank would have had no claim upon the defendant. How, then, can the transaction be said to assume a different aspect because the names adopted were of known persons? That the intention was to treat them as being of fictitious persons is manifest. As cashier, invested with the authority to draw checks upon the bank's accounts with its correspondents, instead of drawing them directly to the order of the parties who he intended should get the moneys, he drew them to the order of persons who had no interest in them, and thereupon wrote their names under a direction to pay to the real parties, who were intended to be the recipients of the funds drawn upon. If the checks had been drawn

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<sup>1</sup> In *Snyder v. Corn Exchange Nat. Bank*, 221 Pa. St. 599, the court says: "A fictitious person within the contemplation of the Act of 1901 is not merely a non-existing one; for, if so, the word 'non-existing' would have been sufficient without more. It is clear, then, that, when the Legislature declared that a check payable to a 'fictitious or non-existing person' is to be regarded as payable to bearer, it meant a fictitious person to be one who, though named as payee in a check, has no right to it, or the proceeds of it, because the drawer of it so intended, and it therefore matters not whether the name of the payee used by him be that of one living or dead, or of one who never existed."

See this point discussed in *Jordan Marsh Co. v. Nat. Shawmut Bk.*, 201 Mass. at p. 410, where the court concludes by saying that "The name so used would be none the less fictitious that it was a real name of a person not intended to be designated."—C.

directly to the order of the real parties, the defendant would undoubtedly have been protected in paying them. As it was, the payees were fictitious persons in the eye of the law, and the only real parties were the firms in New York, to whom the cashier sent them in such form as that they could draw the moneys upon them.

The fictitiousness of the maker's direction to pay does not depend upon the identification of the name of the payee with some existent person, but upon the intention underlying the act of the maker in inserting the name. Where, as in this case, the intent of the act was, by the use of the names of some known persons, to throw directors and officers off their guard, such a use of names was merely an instrumentality or a means which the cashier adopted, in the execution of his purpose to defraud the bank, in an apparently legitimate exercise of his authority. The cashier, through his office and the power confided to him for exercise, was enabled to perpetrate a fraud upon his bank which a greater vigilance of its officers might have earlier discovered, if it might not have prevented. If his position and the confidence reposed in him were such as to enable him to escape detection for the while, then the consequences of his fraudulent acts should fall upon the bank whose directors, by their misplaced confidence and gift of powers, made them possible, and not upon others who, themselves acting innocently and in good faith, were warranted in believing the transaction to have been one coming within the cashier's powers.

It may be quite true that the cashier was not the agent of the bank to commit a forgery, or any other fraud of such a nature; but he was authorized to draw or check upon the bank's funds. If he abused his authority, and robbed his bank, it must suffer the loss. The distinction between such a case and the many other cases which the plaintiff's counsel cites from is in the fact that it was within the scope of this cashier's powers to bind the bank by his checks. In transmitting them made out and indorsed as they were, the bank was so far concluded by his acts as to be estopped from now denying their validity. For the reasons given, the judgment should be affirmed, with costs. All concur, except Bartlett, J., not sitting.<sup>2</sup>

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§ 28 TRUST COMPANY OF AMERICA v. HAMILTON  
BANK OF NEW YORK CITY.

127 APPELLATE DIVISION (N. Y.) 515.

McLAUGHLIN, J. This is a controversy submitted to the court upon an agreed statement of facts under section 1279 of the Code

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<sup>2</sup> Followed in *Snyder v. Corn Exchange Nat. Bk.*, 221 Pa. 599, where the court says that the *Phillips* case is "singularly similar to the one now before us." P. 607. — C.



of Civil Procedure. The controversy relates to four checks for \$500 each, drawn upon the plaintiff, a trust company doing a banking business, and signed: "Estate of Kate M. Wallace. Arthur B. Wallace, Adm'r." At the time the checks were presented to the plaintiff for payment, the estate of Kate M. Wallace was one of its depositors, having to its credit an amount in excess of all the checks, which could be drawn out on checks signed by Arthur B. Wallace, administrator, when countersigned by the United States Fidelity & Guaranty Company. The Wallace estate had then been practically settled, and the amount on deposit was ready for distribution among the next of kin of the decedent. The four checks in question were drawn without the knowledge or authority of the administrator, his signature being forged, and in each there was inserted as payee the name of some one of the next of kin whose distributable share of the amount on deposit with the plaintiff was greater than the amount of the check or checks thus apparently payable to such person. The first check was dated September 25, 1905, and was presented on that day to the United States Fidelity & Guaranty Company by a person unnamed, without the knowledge of plaintiff or defendant. The United States Fidelity & Guaranty Company, relying upon the apparent genuineness of the check, countersigned the same, and it was then, by some person unknown, presented to the plaintiff for acceptance and by it accepted, in writing. The name of the payee was then forged upon the back of the check as first indorser, and it was subsequently deposited with the defendant, by one M. F. Kerby, one of its depositors, who was given credit for the same. It then bore the following additional indorsements: "Harvey J. Conkey. M. F. Kerby. A. Edward Fisher." Thereafter, the defendant, through the New York Clearing House, presented the check to the plaintiff for payment, guaranteeing the indorsements, and it, relying upon the genuineness of the check, with the guarantee of the defendant thereon, not knowing that the indorsement of the payee was forged, paid the same in good faith. Substantially the same facts are true in regard to the second check, which was dated in November, 1905. The other two checks, dated in December, 1905, and January, 1906, were not presented to plaintiff for acceptance before payment and were deposited with defendant by Harvey J. Conkey, one of its depositors, to the credit of his account; otherwise, the same course was pursued with regard to them. They were indorsed "Harvey J. Conkey" below the forged indorsement of the payee.

Upon discovering the forgeries, the plaintiff at once notified the defendant, tendered back the checks, and demanded repayment. In the meantime both Kerby and Conkey had withdrawn the proceeds of the checks, and the defendant, relying on plaintiff's acceptance and payment of them, had paid out the same in good faith. The defendant has refused to pay plaintiff the amount of the checks, or any of them, and the question presented is whether plaintiff is entitled thereto.

The general rule is that payments made under a mistake of fact may be recovered, although negligently made; but it is also settled that, if the drawee of a bill of exchange to which the drawer's name has been forged accepts or pays the same, he can neither repudiate the acceptance nor recover the money paid, since he is bound to know the drawer's signature. *Price v. Neal*, 3 Burrows, 1354; *Bank of United States v. Bank of Georgia*, 10 Wheat. (U. S.). 333; *National Park Bank v. Ninth National Bank*, 46 N. Y. 77; *Goddard v. The Merchants Bank*, 4 N. Y. 147. It is also settled that, where the indorsement of the payee of a bill of exchange has been forged, subsequent holders obtain no title to it, and payments made to one who holds under such forged indorsements may be recovered. *Corn Exchange Bank v. Nassau Bank*, 91 N. Y. 74; *Holt v. Ross*, 54 N. Y. 472; *Canal Bank v. Bank of Albany*, 1 Hill, 287.

Therefore, if all the indorsements on the checks in question had been genuine, the plaintiff could not recover; but if the maker's signatures had been genuine, and only the indorsements or any of them forged, it could recover. Having paid the checks, the plaintiff cannot now be heard to say that the maker's signatures are not genuine, or recover on the ground that the same were forged, and by reason of that fact it is suggested that the rights of the parties are precisely the same as though the drawer's signatures were genuine, and since the defendant never obtained good title to them, on account of the forged indorsements of the payees, the plaintiff is entitled to recover. There are authorities to support this contention. *First Nat. Bank v. Northwestern Bank*, 152 Ill. 296; *McCall v. Croning*, 3 La. Ann. 409. But it does not necessarily follow, because the checks were not indorsed by the persons whose names appeared on them as payees, that the defendant, which received them in good faith and paid value therefor, can be compelled to repay their amounts to the plaintiff.

A leading authority on the subject is *Bank of England v. Vagliano Bros.*, L. R. 1891 App. Cas. 107, which reversed *Vagliano v. Bank of England*, 23 Q. B. D. 243, and 22 Q. B. D. 103. This authority has been frequently cited and is directly in point. \* \* \*

The correctness of the decision in *First National Bank v. Northwestern Bank*, *supra*, may well be questioned, since the decision of the lower court, which was reversed by the House of Lords, in the *Bank of England* case, was cited at length and relied upon. Whether this be so or not, the decisions in our own state are entirely in harmony with the views expressed by the House of Lords. Thus, in *Coggill v. American Exchange Bank*, 1 N. Y. 113, 49 Am. Dec. 310, a partner drew a bill of exchange in the name of the partnership, payable to one Truman Billings and forged thereon the indorsement of the latter. The bill subsequently came into the hands of the defendant bank, and the plaintiff, upon whom it was drawn, accepted and paid it. It was held that the plaintiff, on discovering the forgery, could not re-

cover the amount paid from the defendant, since the bill was in effect payable to bearer, and defendant had good title. Mr. Justice Bronson, who delivered the opinion of the court, distinguished the case of *Canal Bank v. Bank of Albany*, *supra*, and said:

“As the payee had no interest, and it was not intended that he should ever become a party to the transaction, he may be regarded, in relation to this matter, as a nonentity; and it is fully settled that when a man draws and puts into circulation a bill which is payable to a fictitious person, the holder may declare and recover upon it as a bill payable to bearer. \* \* \* In legal effect, though not in form, the bill is payable to bearer. \* \* \* The plaintiff probably accepted and paid the bill under the mistaken assumption that the indorsement was genuine; but he was not mistaken about the main fact which he was concerned to know, which was that the holder was the owner of the bill.”

And in *Phillips v. Mercantile National Bank*, 140 N. Y. 556, the cashier of the National Bank of Sumter, S. C., drew checks in the name of the bank, inserting as payees the names of customers of the bank, whose indorsements he forged. The checks thus drawn were sent to various firms in New York and subsequently came into the hands of the defendant, which received them in good faith and charged them to the account of the Sumter Bank. The receiver of the Sumter Bank thereafter brought an action to recover the amount of these checks, and it was held that the same could not be maintained, since in legal effect the payees were fictitious and the checks payable to bearer, and for that reason the defendant obtained good title. \* \* \*

Under the negotiable instruments law and the cases cited, I am of the opinion the checks in question, as between plaintiff and defendant, were payable to bearer. It does not appear who forged the maker's signatures, but the subsequent history of the checks does not leave it open to doubt that the person who did so knew that the parties whose names were used as payees would never have any interest in the instruments. Just as in the *Bank of England* and the *Phillips* cases, in order to accomplish the fraud more easily, the names inserted as payees were those of persons to whom checks might naturally be made. Whether indorsing the names of the payees upon the checks was technically forgery or not it is unnecessary to consider. It has been convenient to thus describe them. Despite these forged indorsements, then, the defendant acquired good title, since in legal effect the checks were payable to bearer. Plaintiff, having paid them to a holder in due course, cannot recover upon the ground that the payees' signatures were forged.

Nor is this view at all in conflict with *Shipman v. Bank of State of New York*, 126 N. Y. 318. \* \* \* The court held that the plaintiffs could recover from the bank the amount paid, distinguishing the *Bank of England* case, and the distinction is obvious. In the former

case, the member of the firm who signed the checks in the firm name believed that in every instance the payee was a real person to whom alone the check was payable, while, in the latter case, the person who wrote the maker's signature was a forger who knew that, so far as the bills of exchange were concerned, the payee was fictitious. The court expressly recognized the rule that the maker's intention was controlling, saying:

"The maker's intention is the controlling consideration which determines the character of such paper."

It is true that in many of the authorities cited the person guilty of the fraud was connected in some way with one of the parties, which may have affected the equities of the case, as was suggested in *Shipman v. Bank of State of New York*, *supra*, concerning the decision in the Bank of England case, while here, so far as appears, the guilty party was a stranger to both plaintiff and defendant, and they are equally innocent. But that cannot change the law as to the fictitiousness of the payees, and, if it did, I am of the opinion that any equities in the present case are with the defendant. The risk of paying out money upon a forged signature of a depositor is one which a banker must assume, and, if the plaintiff had detected the forgeries when the checks were presented for payment, it would not have suffered any loss, and it is possible that the defendant would not.

I am of the opinion that the plaintiff has no legal claim against the defendant, and for that reason the latter is entitled to judgment upon the merits, with costs. All concur.<sup>3</sup>

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<sup>3</sup> As the New York Court of Appeals has not in any of its decisions passed upon the precise questions involved in this case, this decision cannot, of course, be regarded as settling the law in New York.

See a most instructive article by Professor L. M. Greeley in 3 Ill. Law Rev. 331, entitled "Fictitious payees in forged checks or bills," criticizing this case and *Bank v. Vagliano*, and arguing that *First Nat. Bank v. Northwestern Nat. Bank*, 152 Ill. 296, was correctly decided, and that it is not overthrown by the subsequent enactment of the Illinois Negotiable Instruments Law. In this connection attention is called to the different wording of the Illinois Act (it provides that "the instrument is payable to bearer . . . when it is payable to the order of a person known by the drawer or maker to be fictitious or non-existent, or of a living person not intended to have any interest in it") which "seems to the writer . . . to justify a construction different from that placed upon the English and New York Acts." P. 339.

The note to *Seaboard Nat. Bank v. Bank of America*, 193 N. Y. 26, in 22 L. N. S. 499, entitled "When is a negotiable instrument deemed payable to the order of a fictitious person within the rule which regards such an instrument as payable to bearer," discusses all the cases printed herein on this subject, and deserves a most careful reading. Attention is particularly called to the following extracts:

"The court, in *Kohn v. Watkins*, 26 Kan. 691, . . . makes a distinction bearing on the question now under consideration, as to the necessity of knowledge by the maker or drawer of the fictitious character of the payee, between a case where an instrument purports to be payable to a real person, known at

## § 28 MCKEEHAN, THE NEGOTIABLE INSTRUMENTS LAW.

[41 AM. LAW REG., N. S., pp. 448-450.]

THE second criticism of § 9 [N. Y., § 28], par 3, is that such an instrument is, under the act, payable to bearer *without being indorsed*, and that this, also, ignores the tenor of the instrument. "Nor is there any judicial precedent or mercantile custom," says Professor Ames, "in support of the notion that a bill payable to a fictitious payee, but not indorsed in the name of such payee, is payable to bearer. In all the reported cases, instruments payable to a fictitious payee have been indorsed in the name of such payee before negotiation." That is sub-

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the time to exist, and present to the mind of the maker or drawer as the party to whose order it was to be paid, although, as a matter of fact, he had no connection with the transaction, and a case where there was no such person in existence, although the maker or drawer supposed there was; holding that the drawer's belief that the person named was the real payee will prevent the application of the rule as to fictitious payees in the former case, but not in the latter. As subsequently shown, substantially the same distinction is made by the English cases, when the *Vagliano* case is considered in connection with the subsequent cases." P. 502.

"These cases [*Shipman v. Bank*, 126 N. Y. 318, and *Armstrong v. Nat. Bank*, ante, p. 123] are . . . clearly opposed to the distinction made in the *Kohn* case and the later English cases." P. 503.

"The opinions in these cases [*Vinden v. Hughes* (1905), 1 K. B. 795, and *Macbeth v. Bank*, ante, p. 131] leave, perhaps, some doubt as to whether the doctrine of the *Vagliano* case is restricted to the very facts of that case; *i. e.*, the case of acceptance of a bill where the drawer's signature as well as that of the payee is forged, or whether the doctrine of that case would still be applicable so as to characterize a bill as payable to a fictitious payee, as against an acceptor who had in mind an actually existing person as the payee, where the drawer knew of the fictitious character of the payee, that is, knew that the person named had no connection with the transaction.

"It will be noticed that *Trust Company of America v. Hamilton Bank* [ante, p. 137] . . . was very similar in its essential facts to the *Vagliano* case, and the decision is in harmony with the doctrine of that case, even when confined to the first or narrower of the two hypotheses just stated.

"Aside from the aspect of the question just suggested, the English cases, when considered together, seem to adopt practically the same position and distinction as the Kansas court. In other words, the English doctrine appears to be that the belief of the party sought to be charged, that the payee was an actually existing person, to whom, or upon whose indorsement, he intended the instrument to be paid, will not prevent the application of the rule as to fictitious payees if there was in fact no real person in existence whom he had particularly in mind as payee; but that the intention of the party sought to be charged, at least if he is the drawer, that the instrument was to be paid to or upon the order of an actually existing person, known to him, and in his mind as the person to whom or upon whose order the instrument was to be paid, will defeat that rule." Pages 504, 505.

See also the article entitled "Fictitious payees under Negotiable Instruments Act" in 13 Law Notes, 23.

"In *Keenan v. Blue*, 240 Ill. 177, a promissory note payable to D. L. Buck-

stantially true.<sup>4</sup> If such an instrument requires no indorsement, a departure has been made from what has been supposed to be the law — and Professor Ames and Judge Brewster agree that the new act dispenses with the necessity of an indorsement. Indeed, any other reading of it seems impossible, though whether an indorsement is necessary under the English act has never been decided, and seems fairly open.<sup>5</sup>

Judge Brewster defends the change. He says: "Surely it is more logical to hold that a note which purports to be payable to a person

worth or order was indorsed by Buckworth ' . . . to I. N. Porter or bearer,' signed 'D. L. Buckworth.' So indorsed the note was discounted by the plaintiffs . . . who sued the makers. It was held, . . . Second, that the name 'I. N. Porter' was fictitious, and hence could be disregarded, and the indorsement deemed to be to 'bearer.' The plaintiffs were therefore permitted to recover, though the note was not indorsed in the name of 'I. N. Porter.' One judge dissented on the ground that our statute requires an indorsement in the case of negotiable paper payable to a named person or bearer. Ill. R. S., ch. 98, § 4; *Roosa v. Crist*, 17 Ill. 450. He was of opinion that since the indorser did not know the name 'I. N. Porter' was fictitious, the name could not, as to him, be deemed fictitious, and the indorsement treated as payable to bearer. . . . The name 'I. N. Porter' was fictitious. This, however, was not known by the indorser, Buckworth, the name having been suggested by the plaintiffs, when they arranged with certain note brokers to buy the note, in order to conceal their part in the transaction, the indorser simply writing the indorsement as directed by the brokers. On these facts, it would seem that the name 'I. N. Porter' was simply another name for the plaintiffs, assumed for this transaction — not the name of a fictitious person. The decision of the court seems sound, though perhaps all of the reasons urged in support of it are not. L. M. G." 4 Ill. Law Rev. 354. — C.

<sup>4</sup> In New York, however, it has been held for many years that a bill or note payable to the order of a fictitious payee is payable to bearer without being indorsed by the maker or payee. *Plets v. Johnson*, 3 Hill, 112; *Central Bank of Brooklyn v. Lang*, 1 Bosworth, 203; *Irving N. B. v. Alley*, 79 N. Y. 356.

<sup>5</sup> It might be argued that the words "may be treated as payable to bearer" used in the English act mean that the bill may be so treated only when regular in all other respects, *i. e.*, among other things, when properly indorsed. Judge Chalmers, the draughtsman of the English act, says of this sub-section: "When a bill is payable to the order of a fictitious person, it is obvious that a genuine indorsement can never be obtained, and in accordance with the language of the old cases and text books, the act puts it on the footing of a bill payable to bearer. But inasmuch as a bill payable to one person but in the hands of another is patently irregular, it is clear that the bill should be indorsed, and perhaps a *bona fide* holder would be justified in indorsing it in the payee's name. It might have been better if the act had provided that a bill payable to the order of a fictitious person might be treated as payable to the order of anyone who should indorse it, or, in other words, as indorsable by the bearer." *Chalmers' Bills of Exchange*, 5th edition, page 22. From this, it would appear that the failure of the English act to require an indorsement was a mere oversight — though the use of the words "may be treated" furnishes a method of correcting the omission. Judge Brewster's readiness to defend the change in the American act seems to indicate that the change was intentional. Except for this, one would suppose that it had been an oversight.

when there is no such person, and the maker knows it, must have been intended to be payable to bearer, than to hold that somebody must assume the name of such fictitious person and make a false indorsement in order to give title to the note." There is much common sense in that. But the trouble is that title to a note payable to order is derived through the indorsement on the back of it. What "must have been intended" by a maker who names a fictitious payee it is extremely hard to say. Moreover, both commercial practice and legal theory tend more and more to disregard everything except that which actually appears on the instrument. When A. makes his note payable to "John White or order" all our notions about negotiable paper require that John White be written on the back of this note, even though no such person as John White exists. It seems necessary for form's sake. To dispense with the necessity for it gives a decided jolt to our ideas. Aside from this, however, it is difficult to see how any harm can result from the change. In the first place (and though this does not touch the theory of the criticism, it does touch its practical worth) notes payable to fictitious payees and unindorsed, will be about as plentiful as counterfeit dollars labelled "counterfeit." Either the maker or the person to whom he delivers the instrument will indorse it in the name of the fictitious payee. Why? Because otherwise no one would discount it. It would be patently irregular on its face. An indorsement is necessary to give such a note *any commercial value*.

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(c) *When the name of the payee does not purport to be the name of any person.*

§ 28      GORDON v. LANSING STATE SAVINGS BANK.

[Reported herein at p. 107.]

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(d) *When the only or last indorsement is an indorsement in blank.*

§ 28      CURTIS v. SPRAGUE.

51 CALIFORNIA, 239. — 1876.

THE defendant, Thomas Sprague, executed, and delivered his promissory note to the plaintiff, Dennis. Dennis indorsed the note in blank, and delivered it to F. Maguire. Subsequently, Maguire assigned the note to Dennis by indorsement, without recourse, and redelivered the same to him. Afterwards, Dennis delivered the note to the plaintiff Curtis, without receiving any value, but with an agreement that Curtis should bring suit and divide with him what he recovered. The plaintiff recovered judgment and the defendants appealed.

*By the Court:* \* \* \*

2. There was no error in the refusal of the court below to nonsuit the plaintiff on the motion of the defendants. When the note was delivered to Curtis, it had on the back the blank indorsement of Dennis, the payee; and "the first effect of an indorsement in blank, is to make the paper payable, not to the transferee as indorsee, but as bearer." (2 *Parsons on Notes and Bills*, 19.)

Curtis, therefore, acquired the legal title to the note, with a corresponding right of action, when it was delivered to him by the payee, indorsed in blank. We attribute no importance to the fact that the note had before been delivered by Dennis with the blank indorsement to Maguire, and that the latter had redelivered it to Dennis, with a special assignment. The title would have been as effectually reinvested in Dennis by mere delivery, without the assignment, as with it; and when Dennis afterwards delivered the note to Curtis, there was no need that he should again indorse it in blank, in order to convey the legal title, as the blank indorsement already on it was effectual for that purpose.

3. The legal title and right of action being wholly in Curtis, the court erred in permitting Dennis to be joined as a co-plaintiff. But it was an error which has wrought no substantial injury to the defendants. Nevertheless, in order to preserve a proper consistency in the record, we deem it better to remand the cause for further proceedings.

It is therefore ordered that the judgment be reversed, and the cause remanded, with an order to the court below to vacate the order allowing Dennis to be joined as a co-plaintiff, and to enter a judgment in the findings in favor of the plaintiff Curtis.<sup>1</sup>

## § 28

### WETTLAUER v. BAXTER.

125 SOUTHWESTERN (KY.) 741. — 1910.

CARROLL, J. In the state of New York on July 3, 1905, the Buffalo Carriage Top Company executed to Newton J. Baxter the following note: "January 15, 1906, after date we promise to pay to Newton J. Baxter two hundred and fifty dollars at 58 Carroll St., Buffalo, N. Y." On the back of the note Newton J. Baxter wrote his name, and before its maturity it was discounted by appellant, Wettlaufer, and delivered to him by Baxter. When the note fell due it was presented to the Buffalo Carriage Top Company for payment, and payment refused. Thereupon the note was protested by a notary, and notice of its dishonor mailed to Baxter at his residence, in Owensboro, Ky. Baxter declining to pay the note, suit was brought on it

<sup>1</sup> Accord: *Middleton v. Griffith*, 57 N. J. L. 442. — H.



against him in the Daviess Circuit Court. A general demurrer was sustained to the petition, and, declining to plead further, the petition was dismissed. \* \* \*

The questions involved in the case are: Was the note before its indorsement by Baxter a negotiable instrument within the meaning of the negotiable instrument act? Or, if not, did Baxter, by signing his name on the back of the note and selling and delivering it before maturity to Wettlaufer, convert it into a negotiable note and make all the parties to it subject to the negotiable instrument act the same as if it had been a negotiable note in the first instance?

The contention of counsel for Baxter is that the note was not a negotiable instrument, and that Baxter by signing his name on the back of the note became merely an assignor. \* \* \*

On the other hand, the contention for Wettlaufer is that the liability of Baxter upon this note is to be determined by the negotiable instrument act, \* \* \* and that by the provisions of this act Baxter occupies the position of an indorser and not as assignor of the note. Or, in other words, that, although the note may not have been negotiable when first executed and delivered, Baxter by his indorsement converted it into a negotiable note. \* \* \*

[After quoting sections 1, 8, 9, 30, 34, and 184 of the Kentucky act,<sup>2</sup> the court continues:]

For the purpose \* \* \* of ascertaining what bills and notes it was intended should be negotiable within the meaning of this act, we may with propriety inquire what words were generally considered necessary to make a bill or note negotiable before this act went into effect, with a view of noting what change if any was made in this particular. In an article in 7 Cyc., p. 606, by a well-known writer on commercial paper, it is said: "the usual form of negotiable paper is a provision for payment to 'order' or 'bearer.' These or similar words are in general necessary to its negotiability, and are often required by statute, but a note which is non-negotiable for want of such words is still a valid note and may be declared on as such. Bills payable to bearer were formerly held to be non-negotiable, as being without words of transfer; but they are now recognized as negotiable and transferable by delivery. Making the instrument payable 'to the order of' a person named is the same as to such person 'or order'; and in like manner to a person named 'or bearer' is the same in effect as 'to bearer.' Without words of negotiability purchasers take the bill or note subject to all defenses which were available between the original parties; and if it was originally non-negotiable, as against the original parties, it will not be rendered negotiable by subsequent transfer in negotiable form." The same rule is announced in 4 Am. & Eng. Ency. of Law, 133; *Story* on Bills of Exchange, § 60; *Daniel* on

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<sup>2</sup> N. Y., §§ 20, 27, 28, 60, 64, and 320. — C.

Negotiable Instruments, § 105; *Bank v. Butler*, 113 Tenn. 574, 83 S. W. 655; *Westburg v. Chicago Lumber Co.*, 117 Wis. 589, 94 N. W. 572.

It will thus be seen that it was uniformly held that, in order to make a note or a bill negotiable, the words "to order" or "to bearer," or equivalent words, must be used in the body of the note. It will be kept in mind, however, that the absence of these words do not affect the validity of a note or render it non-transferable or non-assignable. Their only effect is to make the instrument negotiable, and thereby cut off defenses that the maker or either of the parties to the paper might have and make against a holder in due course if the note was not negotiable. The negotiable instrument act does not apply to or affect the rights or liabilities of persons on paper that is not within its meaning negotiable. \* \* \* This note in our opinion, which was payable to Baxter alone, and did not contain the words "to order" or "bearer," was not a negotiable instrument. These words by sections 1 and 184<sup>3</sup> are indispensable to make the paper a negotiable instrument within the meaning of the act.

But the argument is further made that as Baxter indorsed the note in blank—that is, signed his name on the back of it without any other words—he thereby converted the note into a negotiable instrument. It is true that section 9 of the act provides that "the instrument is payable to bearer \* \* \* when the only or last indorsement is an indorsement in blank;" but this does not mean that an indorsement in blank converts a note non-negotiable on its face and by its terms into a negotiable note. This construction would enable the person who last signed his name on the back of the note to change entirely the contract as entered into between the parties, and have the effect of making the maker, payee, and all prior indorsers liable upon a negotiable instrument when they intended to and only became liable upon a note that was not negotiable, and this, as can readily be seen, would be a most important and material change in the obligation assumed by them when they signed the paper. To give the act this construction would place it in the power of any indorser who chose to sign his name in blank to change by this act the entire character of the paper as well as the rights and liabilities of the parties to it. It would make the character of the paper depend upon the manner of the indorsement and not upon the terms expressed in the paper. Thus, if A. indorsed it in blank to B., it would be negotiable; but, if B. indorsed it specifically to C., it would be non-negotiable. Manifestly it was not intended that the mere indorsement of the note by a remote or other indorser should have this effect. When a paper is started on its journey into the commercial world, it should retain to the end the character given to it in the beginning and written into its face. If it

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<sup>3</sup> N. Y., §§ 20 and 320. — C.

was intended to be a negotiable instrument, and was so written, it should continue to be one. If it was intended to be a non-negotiable instrument and was so written, it should so remain. Then every one who puts his name on it, as well as every one who discounts or purchases it, will need only to read it to know what it is and what his rights and liabilities are.

In our opinion section 9 was merely intended to describe or designate the conditions under which a note negotiable on its face might become payable to bearer, and was not intended to apply to a note not on its face or by its terms negotiable. To illustrate, if this note was payable to "Newton J. Baxter or order," then the paper upon its face would be a negotiable instrument, although payable only to Baxter or order, and the only effect of the indorsement on the note by Baxter in blank would be to convert the note from a note payable to order into an instrument payable to bearer. But this indorsement would not in any manner change the negotiability of the note, nor change the attitude of any of the prior parties on the note, or increase their liability or cut off any defenses that they might have made, as it was at all times a negotiable instrument. Then, too, "when the only or last indorsement is an indorsement in blank," the payee without notice of any defect in the title of the holder may pay the same to him, as it will be presumed it came into his hands in due course; no indorsement being necessary. Although the note under our construction of the Negotiable Instrument Act was not a negotiable instrument, yet Baxter had the right to indorse it and transfer it by delivery, and pass whatever title he had to the transferee or assignee. But the assignee would then take the note, not subject to the provisions of the Negotiable Instrument Act, but under the law applicable to non-negotiable paper. \* \* \*

The judgment is affirmed.\*

## V. Drawee must be certain.

### § 20

### WATROUS *v.* HALBROOK.

39 TEXAS, 573. — 1873.

OGDEN, P. J. This suit was brought by the heirs of John S. Storrs against the estate of D. E. Watrous, on the following instrument of writing, viz.:

\$2771.62

MONTEVALLO, June 1, 1858.

Ten months after date pay to the order of John S. Storrs, two thousand seven hundred and seventy-one and 62-100 dollars, value received, and charge to account of

D. E. WATROUS.

To ———, Mobile, Ala.

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\* For further discussion of § 28, see extract from McKeehan's Negotiable Instruments Law, *post*, pp. — C.

The petition charged that for a valuable consideration from John S. Storrs to him thereunto moving, said Daniel E. Watrous executed and delivered to said Storrs the instrument of writing above set out, and that thereby said Watrous undertook, and bound himself, and became liable to pay said sum therein specified.

To this petition the defendants filed a general and special demurrer, which were both overruled by the court, and judgment was rendered for the plaintiffs, and the defendants took their bills of exception to the ruling of the court, and brought the case here by appeal.

The only question now presented for decision is, does this instrument, independent of any allegations of ownership for a valuable consideration, or promise to pay, give the holder any cause of action.

This instrument is not a promissory note in its ordinary form, nor can it be treated as such, since there is no promise to pay in any event. The instrument is directed to no one, and therefore cannot be considered a draft or bill of exchange. Had it been accepted by any one, that acceptance would have constituted a promise to pay in the acceptor, and then the maker might have become liable as surety or guarantor; but as there is no drawee or acceptor, the maker cannot, without allegations and proof of other facts setting forth and establishing his liability, be held responsible. The instrument, with the exception of the want of a drawee, is in the ordinary form of an accommodation bill or draft, on which the maker cannot be held liable until after an acceptance or non-acceptance. We think the instrument, as it is, is an imperfect bill or draft, for the payment of which no one is liable. With proper averments, showing the objects and purpose of the parties, and that the maker intended to bind himself in the first instance to pay the same, he might possibly be held responsible without a drawee or acceptor, but not otherwise.

We can see no material difference between the writing here sued on and the one in *Ball v. Allen* (15 Mass. 433), in which the court says: "But the mere possession of a paper drawn in the form of an order, there being no drawee in existence, we think cannot entitle the possessor to an action in any form."

The same doctrine may be drawn from *Peto v. Reynolds* (9 Exch. R. 414) and in *Davis v. Clark* (4 Eng. Com. Law R. 177). From these authorities, and the reason of law governing instruments of this or the like character, we are clearly of the opinion that the petition in this case did not set out a good cause of action, and that the court erred in overruling defendant's special demurrer to the same. We think the demurrer should have been sustained and the plaintiffs permitted to amend their pleadings, that, if desired, they might, by proper averments and proof, establish the liability of the maker or drawer in the first instance, without an acceptance or non-acceptance.

The judgment of the District Court is reversed and the cause remanded.

Reversed and remanded.<sup>5</sup>

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§ 20 *FUNK v. BABBITT*, 156 Ill. 408. — 1895. “B. Apr. 23, 1891. Thirty days after date pay to the order of E. D. Babbitt \$350, for value received. Funk & Lackey.” MR. JUSTICE BAKER: “Said instruments were declared on as promissory notes. It is urged that they are not notes, or even promises to pay, and, not being directed to any one, do not constitute drafts or orders, and in fact amount to no more than blank pieces of paper. They are, undoubtedly, very irregular and informal instruments, but they are not void as written evidences of indebtedness. A person may draw a bill upon himself, payable to a third person, in which case he is both drawer and drawee. Here the firm drew bills, but did not address them to any third person or persons, and it is therefore to be regarded that they were, in legal effect, addressed to themselves, as drawees, and the signatures of the firm to the several bills bound the firm both as drawers and acceptors. The instruments are inland bills of exchange, to which the firm sustains the triple relation of drawers, drawees, and acceptors, and as the declaration contains the consolidated common counts, the bills were admissible in evidence under them. Moreover, the drawers and drawees being the same, the bills are, in legal effect, promissory notes, and may be treated as such, or as bills, at the holder’s option. (1 *Daniel on Neg. Inst.*, §§ 128, 129).”

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§ 20 *WHEELER v. WEBSTER*, 1 E. D. Smith (N. Y. C. P.) 1 (1850). *By the Court*, INGRAHAM, FIRST J. “I am of the opinion that the omission of the name of the drawee at the foot of the bill will not vitiate it. The acceptance may be considered as supplying the defect, and as being an admission by the acceptor, that he is the person intended. At any rate, it does not lie with him to make such defense, after having admitted, by the acceptance, that he was the person intended, and after having promised to pay the draft at maturity. He is estopped, by his own act, from such a defense.”

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<sup>5</sup> In *Peto v. Reynolds*, (9 Exch. 410), cited above, the bill was not addressed to any drawee, but across the face was written: “Accepted, Samuel Reynolds, Esq., Shorn Lane, Bedminster, Bristol.” One Righton (the drawer of the bill) wrote this acceptance. Defendant denied Righton’s authority. There was evidence that defendant had orally promised to pay the bill, but whether absolutely or conditionally was not clear. Plaintiff had a verdict. The court held there must be a new trial because of the unsatisfactory state of the evidence. Three of the four judges expressed the opinion, however, that the instrument was not a bill of exchange for the want of a drawee, but might be treated as a promissory note if Reynolds, in fact, ratified the signature. — H.

**VI. Delivery essential.****§ 35 HILLSDALE COLLEGE v. THOMAS.**

40 WISCONSIN, 661. — 1876.

ACTION on a promissory note signed by defendant's testator and payable to plaintiff.

The answer is to the effect that one Parmalee, an agent of the plaintiff, called upon the defendant's testator, and solicited him to purchase a scholarship in the plaintiff college, which he at first refused to do; that finally, at the request of Parmalee, he signed the note in suit, and left it with Parmalee, under an agreement that the latter should hold it for the testator until a certain time, to be returned to the testator in case he should not decide to purchase such scholarship, and in the meantime the note should not be considered as delivered to the plaintiff; and that at the specified time, the testator informed Parmalee that he had decided not to purchase the scholarship, and demanded a return to him of the note, but Parmalee, professing to have sent the note by mistake to the plaintiff, did not comply with such demand.

On the trial, by proof and the defendant's admissions, plaintiff made a *prima facie* case. Defendant offered testimony tending to prove the averments of the answer, but an objection to its admission was sustained; and the jury, by direction of the court, returned a verdict for the plaintiff for the amount due on the note by its terms. From a judgment entered on such verdict the defendant appealed.

LYON, J. The ruling of the court rejecting all testimony under the answer is equivalent to an order sustaining a general demurrer thereto. It is an adjudication that the answer does not contain facts sufficient to constitute a defense to the action. If it states a defense, the ruling is erroneous and fatal to the judgment. We have no doubt whatever that the answer states a complete defense to the action, and that the testimony offered to prove the allegations thereof should have been received.

The note was not left with Parmalee, the agent of the plaintiff, as an escrow. On the contrary, the defendant's testator retained the absolute control of the note, and the right to recall it if he chose to do so. Such a deposit has none of the essential features of a delivery in escrow, and hence we are not called upon to determine the legal effect of the delivery of a note in escrow to the agent of the payee.<sup>6</sup>

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<sup>6</sup> While it is now generally conceded that a negotiable instrument may be delivered in escrow to a third person for the payee, the same as a sealed instrument, it is a disputed question whether it may be so delivered in escrow directly to the payee or his agent. The following cases hold that it may not: *Stewart v. Anderson*, 59 Ind. 375; *Jones v. Shaw*, 67 Mo. 667; *Garner v. Fite*, 93 Ala. 405; *Carter v. Moulton*, 51 Kans. 9. The following cases hold that it may: *Burke v. Dulaney*, 153 U. S. 228; *Benton v. Martin*, 52 N. Y. 570; *Wat-*

There was no delivery of the instrument, and hence it never had an inception or legal existence as the note or obligation of the testator. It remained mere waste paper, just as it would have been had the testator kept it in his pocket instead of leaving it with Parmalee. The fact that Parmalee was the agent of the plaintiff is of no importance. Were the plaintiff a natural person, and had the testator left the note with such person under the same circumstances, it would not be a delivery, and would confer no right of action. Had the paper been put in circulation, and were the plaintiff a *bona fide* holder thereof, for value, before due, we would or might have to determine whether or not the testator had been guilty of negligence in the premises. But we have no such question in this action. These views are abundantly sustained by the following cases: *Walker v. Ebert*, 29 Wis. 194; *Kellogg v. Steiner*, Id. 626; *Butler v. Carns*, 37 Id. 61; *Thomas v. Watkins*, 16 Id. 549; *Chipman v. Tucker*, 38 Id. 43; *Roberts v. McGrath*, Id. 52; *Roberts v. Wood*, Id. 60.

Judgment reversed and a new trial awarded.<sup>7</sup>

## § 35

### KINYON v. WOHLFORD.

17 MINNESOTA, 239. — 1871.

ACTION on a promissory note, brought in the District Court for Steele county, resulting in a verdict for the defendant. Plaintiff moved for a new trial, which was denied, and he appeals to this court from the order denying such new trial. A single point only is discussed in the appeal, which is fully stated in the opinion.

*By the Court* — BERRY, J. This is an action upon a promissory note payable by its terms to C. W. Stevens, or bearer, and signed by the defendant.

There was plenary evidence showing that the plaintiff is a *bona fide* holder of the note, having purchased the same before maturity in good faith, without notice, and for value.

The only defense urged here is that there was no *delivery* of the

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*kings v. Bowers*, 119 Mass. 383; *Brown v. St. Charles*, 66 Mich. 71; *Sweet v. Stevens*, 7 R. I. 375. — H.

[For authorities on the admissibility of parol evidence to show conditional delivery of bill or note see the following: *Beach v. Nevins*, 162 Fed. 129, 18 L. N. S. 288 with note; *Graham v. Remmel*, 76 Ark. 140; *St. Paul's Ep. Ch. v. Fields*, 81 Conn. 670; *Murray v. W. W. Kimball Co.*, 10 Ind. App. 141, 184; *Oakland Cem. Ass'n v. Lakins*, 126 Iowa, 121, 3 A. & E. Ann. Cas. 559 with note; *McNight v. Parsons*, 135 Iowa, 390, 15 A. & E. Ann. Cas. 665 with note; *Hurt v. Ford*, 142 Mo. 283; *Jamestown Bus. College v. Allen*, 172 N. Y. 201, 92 Am. St. Rep. 740 with note. — C.]

<sup>7</sup> See note on "Instruments put in circulation in violation of instructions or conditions" in 11 Am. St. Rep. 314-316. — C.

note to any person by or on behalf of the defendant; that for want of *delivery* it is not the *note* of defendant, and he is not liable thereon even to a *bona fide* holder. "A *bona fide* holder for value, without notice, is entitled to recover upon any negotiable instrument, which he has received before it has become due, notwithstanding any defect or infirmity in the title of the person from whom he derived it; as, for example, even though such person may have acquired it by fraud, or even by theft, or by robbery." (*Story* on Prom. Notes, § 191; 2 Gr. Ev., § 171; *Swift v. Tyson*, 16 Pet. 1; *Goodman v. Symonds*, 20 Howard 365; *Raphael v. Bank of England*, 17 C. B. 162; *Wheeler v. Guild*, 20 Pick. 545; *Magee v. Badger*, 34 N. Y. 249; *Powers v. Ball*, 27 Vt. 662; *Catlin v. Hamon*, 1 Duer, 325; *Gould v. Seger*, 5 Duer, 268; *Marston v. Allen*, 8 Mees. & W. 494; Sm. Lea. Cas. 597 *et seq.*; 1 Ross, Lead. Cases, 205 *et seq.*)

The fact that there has been no delivery of the instrument by or for the maker, or by or for an indorser through whom the holder must claim, is a defect or infirmity of title within the meaning of the rule above cited, a rule which is said to be laid up among the fundamentals of the law. (*Worcester Co. Bank v. Dorch. & Melton Bk.*, 10 Cush. 488; *Edwards* on Bills and Notes, 188; *Gould v. Seger*, *supra*; *Ingham v. Primrose*, 7 C. B. (N. S.) 82; *Shippey v. Carroll*, 45 Ill. 285; *Clark v. Johnson*, 52 Ill.)

The order denying a new trial must be reversed.\*

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\* For an excellent case setting forth with great persuasiveness the contrary doctrine, see *Salley v. Terrill*, 95 Me. 553. In this case the defendant was engaged in a lumbering operation, and Hurd was in his employ. Among his duties was that of keeping the time of the men in the woods, and when one was discharged to draw an order on the defendant for the amount due. Blank orders were furnished Hurd by the defendant for this purpose. As a matter of practice, Hurd drew an order on the defendant, payable to the order of Harry Carter, for \$75.25, the same being in full settlement for cooking. This order was never delivered to Carter, nor intended to be delivered. Hurd left it on his table, with other papers, for a few moments, while he was called away, and on his return he took all the papers and everything, and burnt them up, and supposed the order was thus burned. Carter in the meantime had abstracted the order. Later Hurd, thinking of the order, asked Carter, who had been near when it was written, if he had seen it, and he said he had not. Carter negotiated the order to the plaintiff for a valuable consideration without notice of the facts.

Judgment was rendered for defendant, the court saying: "In the case before us, where the order had never been delivered, and therefore had no legal inception or existence as an order, the question is whether there is any liability upon it to an innocent indorsee for value. As is said in *Burson v. Huntington*, 21 Mich. 415: 'The wrongful act of a thief or a trespasser may deprive the holder of his property in a note which has once become a note or property by delivery, and may transfer the title to an innocent purchaser for value. But a note in the hands of a maker before delivery is not property, nor the subject of ownership, as such. It is in law but a blank piece of paper. Can the theft or wrongful seizure of this paper create a valid contract on the



§ 35 MASSACHUSETTS NATIONAL BANK *v.* SNOW.

187 MASSACHUSETTS, 159. — 1905.

ACTION by the Massachusetts National Bank against one SNOW. Verdict for defendant, and plaintiff brings exceptions.

KNOWLTON, C. J. This is an action of contract on three promissory notes, signed, "H. G. & H. W. Stevens," payable to the order of the defendant, indorsed by him in blank, and discounted by the plaintiff. They severally bear date December 9, 1897, and the rights of the parties are accordingly governed by St. 1898, p. 492, c. 533, sometimes called the "Negotiable Instruments Act," which is now embodied in Rev. Laws, c. 73, §§ 18-212, inclusive. In referring to different provisions of this statute, it may be convenient to cite the sections of the Revised Laws, rather than the original act.

The maker of the notes, H. W. Stevens, who did business under the name of H. G. & H. W. Stevens, has deceased; and the defendant introduced evidence tending to show that, after the defendant had indorsed the notes, they were taken from his possession by the maker, without his knowledge or consent, and discounted at the plaintiff bank, and that they were altered by the insertion of the words "seven

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part of the maker against his will where none existed before? There is no principle of the law of contracts upon which this can be done, unless the facts of the case are such that in justice and fairness, as between the maker and the innocent holder, the maker ought to be estopped to deny the making and delivery of the note.' . . . That there must be delivery of the paper, either actually or constructively, is clear. Until then it has no existence as a contract. *Bank v. Strang*, 72 Ill. 559."

The court further held that the case did not fall "within the principle that, when one of two innocent persons must suffer by the act of a third, he who has enabled such third person to occasion the loss must sustain it. . . . The order was drawn at the table of Hurd, and momentarily left there with other papers of his, to which no one had right of access, and from which it could only be abstracted by a criminal act, which he could not reasonably anticipate."

See also the note in 19 L. N. S. 107, entitled "Rights of owner of negotiable paper payable to bearer, or indorsed in blank, as against *bona fide* purchaser from one unlawfully in possession thereof," where the authorities, pro and con, on the question whether a delivery is necessary to the existence of the instrument as an enforceable contract are exhaustively considered (see particularly, pages 109-111).

The conflict of authority in the decisions represented by the *Salley* and the *Kinyon* cases was resolved in favor of the doctrine of the latter cases by section 35 of the Negotiable Instruments Law. "The primary purpose of the Negotiable Instruments Law was to make the law relating to commercial paper uniform throughout the United States. Specifically, it was the purpose of the act to exclude non-delivery by the maker as a defense to a suit on a note complete in form and execution by a holder in due course." 8 Mich. Law Rev. 41. "This change, like some others made by the act, is in the direction of facilitating the circulation of commercial paper." Crawford's Neg. Inst. Law, 3d ed., p. 28.—C.

per cent." after the words "with interest." The defense is founded on this evidence. The defendant's counsel stated that he made no contention that the bank had actual knowledge of any infirmity in the instruments, or defect in the title to them, or that it took them in bad faith. Nor was it contended by the defendant that in discounting the notes the bank acted otherwise than in the regular and usual course of business. But upon the defendant's testimony it might be found that the notes were given to him by the maker in payment of indebtedness; that, after he had indorsed them in blank, and put them in his desk for collection or discount, he was called out of his office, leaving the maker, Stevens, there; and that Stevens then took them without right, and three days later carried them to the plaintiff bank, and caused them to be discounted for his own benefit.

The plaintiff made many requests for rulings, which were refused, subject to its exception, among which were the following: \* \* \*

"Fifth. That, when an instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him, so as to make them liable to him, is conclusively presumed." \* \* \*

"Ninth. That a holder of a note is deemed *prima facie* to be a holder in due course. \* \* \*

"Nineteenth. That when an instrument has been materially altered, and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor." \* \* \*

The plaintiff also excepted to the following instructions given at the request of the defendant:

"Fourth. That if the jury find that the notes were taken from the defendant wrongfully, and that the same were never delivered by the defendant to Stevens, the plaintiff gained no title to the notes by the negotiation of the same by Stevens, and the plaintiff cannot recover.

"Fifth. The burden is upon the plaintiff to show that the notes were delivered by the defendant to Stevens, or some other person authorized to negotiate them at the plaintiff bank."

"Seventh. Or, in the alternative, if the jury find that the notes in question were altered by the addition of the words 'seven per cent.' thereto after the same were indorsed by the defendant, such an alteration is a material and wrongful one, destroying the validity of the notes, and upon the notes, or any one of them, thus altered, the plaintiff cannot recover."

The notes, being indorsed in blank, were payable to bearer, within the meaning of the statute. Rev. Laws, c. 73, § 26 (5).<sup>9</sup> When the notes were taken to the plaintiff for discount, Stevens was the bearer. Rev. Laws, c. 73, § 207.<sup>1</sup> The presentation of such notes for discount

<sup>9</sup> N. Y., § 28, subd. 5. — C.

<sup>1</sup> N. Y., § 2. — C.

raised a presumption of fact that the bearer was the owner of them. *Pettee v. Prout*, 3 Gray, 502. Upon the undisputed evidence, and upon the defendant's admission that the plaintiff took them in good faith, and discounted them without knowledge of any infirmity in them or defect of title in Stevens, the plaintiff became a holder in due course, within the definition of the statute. Rev. Laws, c. 73, §§ 69-76; <sup>2</sup> *Boston Steel & Iron Company v. Steuer*, 183 Mass. 140.

The defendant's contention that, after the notes had been delivered to the defendant and indorsed by him, they were stolen by Stevens, brings us to the question whether, under the Negotiable Instruments Act, a holder in due course of a note payable to bearer, that has been stolen, can acquire a good title from the thief. Even before the enactment of the statute, while the decisions were not uniform, the weight of authority was in favor of an affirmative answer to the question. *Wheeler v. Guild*, 20 Pick. 545, 550, 553; *Worcester, etc., Bank v. Dorchester, etc., Bank*, 10 Cush. 488; *Wyer v. Same*, 11 Cush. 51, 53; *Spooner v. Holmes*, 102 Mass. 503; *London Joint Stock Bank v. Simmons*, (1892) App. Cas. 201, and cases cited; *Smith v. Bank*, 1 Q. B. D. 31; *Goodman v. Simonds*, 20 Howard 343-365; *Murray v. Lardner*, 2 Wall. 110; *Hotchkiss v. National Shoe & Leather Bank*, 21 Wall. 354; *Kinyon v. Wohlford*, 17 Minn. 239 (Gil. 215); *Clarke v. Johnson*, 54 Ill. 296; *Seybel v. National Currency Bank*, 54 N. Y. 288; *Evertson v. National Bank of Newport*, 66 N. Y. 14; *Kuhns v. Gettysburg National Bank*, 68 Pa. 445.

The following specific language of the statute touching this question, as well as its provisions in other sections, was intended to establish the law in favor of holders in due course: "But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him, so as to make them liable to him, is conclusively presumed." Rev. Laws, c. 73, § 33.<sup>3</sup> This conclusive presumption exists as well when the note is taken from a thief as in any other case. Of course, this rule does not apply to an instrument which is incomplete. But in reference to a complete, negotiable promissory note, payable to bearer, it is a wholesome and salutary provision. See *Greaser v. Sugarman*, 37 Misc. (N. Y.) 799. Upon the defendant's statement and the counsel's theory of the case, the rule is applicable. The note was not only complete in form and in execution, but, upon his testimony, it had been delivered to him by the maker as a binding instrument, and had afterwards been indorsed by him. Therefore the first sentence of Rev. Laws, c. 73, § 33, "Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto," was inapplicable. The instrument had taken effect, and was subsequently

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<sup>2</sup> N. Y., §§ 91-98. — C.

<sup>3</sup> N. Y., § 35. — C.

negotiated by the bearer to the plaintiff as a holder in due course. That the bearer was also the maker was immaterial after the instrument had been so indorsed as to become payable to bearer. Upon the plaintiff's theory of the facts, there was no theft, but an ordinary accommodation indorsement by the defendant for the benefit of the maker, and none of these questions arise. We are of opinion that the judge erred in giving the fourth and fifth instructions requested by the defendant, and in refusing other instructions requested by the plaintiff, founded upon a different view of the statute.

There was also error in the instructions given as to the alleged alteration of the notes. By Rev. Laws, c. 73, § 141,<sup>4</sup> it is provided that "when an instrument has been materially altered, and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor." This language is directly applicable to the present case. See *Scholfield v. Earl of Londesborough*, (1894) 2 Q. B. 660, (1895) 1 Q. B. 536, (1896) A. C. 514; *Schwartz v. Wilmer*, 90 Md. 136-143.

We understand that the instructions were given independently of any question of pleading, and we therefore do not deem it necessary to determine at this stage of the case whether the plaintiff should amend its declaration by inserting counts upon the notes as they were before the alleged alteration, if it wishes to recover upon them as notes bearing interest at only 6 per cent. See *Mutual Loan Ass'n v. Lesser*, 76 App. Div. (N. Y.) 614. Nor do we consider other questions which are not likely to arise upon a second trial.

Exceptions sustained.

## § 35

## BUZZELL v. TOBIN.

201 MASSACHUSETTS, 1. — 1909.

CONTRACT, by one alleged to be the holder in due course of a check signed by the defendant, to recover the amount of the check.

At the trial there was evidence tending to show that the defendant had agreed to purchase two horses of one Leonard, that Leonard brought the horses to the defendant's place of business, the defendant previously having made out and signed and left on his desk a check payable to Leonard's order for the purchase price of the horses; that the defendant unexpectedly was called upon to leave his office for a short time, and that, in his absence, at Leonard's request, the defendant's bookkeeper delivered the check to him; that very shortly thereafter the defendant stopped payment of the check, but that, in the meantime, Leonard had negotiated the check for value to the plaintiff, who had no notice of the transaction between Leonard and the

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<sup>4</sup> N. Y., § 205. — C.

defendant. The defendant's evidence tended to show that the book-keeper had no authority to deliver the check to Leonard, and that the reason why he stopped payment on the check was that he discovered that the horses were unsound.

At the close of the evidence, the defendant requested the presiding judge to rule that the plaintiff could not recover. The request was refused and the jury returned a verdict for the plaintiff. The defendant alleged exceptions.

BRALEY, J. If the consideration of the check as between the defendant and the payee was the price of a pair of horses, which might have been found to have been unsound at the time of sale, yet the plaintiff as indorsee having taken it for value, and in good faith before it was overdue, and without notice of any infirmity, or that payment had been stopped at the bank, became a holder in due course, with all the rights appertaining to such a title. Rev. Laws, c. 73, § 69;<sup>5</sup> *Wheeler v. Guild*, 20 Pick. 545, 552, 553, 32 Am. Dec. 231; *Shawmut National Bank v. Manson*, 168 Mass. 425; *Massachusetts National Bank v. Snow*, 187 Mass. 159. The defendant, while not expressly conceding this, rests his defense solely on the ground that, because his clerk had no express authority to deliver the check to the payee, it was unlawfully put in circulation, and the contract being incomplete, no title passed to the plaintiff by its subsequent negotiation. *Fearing v. Clark*, 16 Gray, 74; *Hill v. Hall*, 191 Mass. 253, 265. But the check was in the hands of the plaintiff as a holder in due course, and as to him a valid delivery by the defendant was conclusively presumed, even if this defense would have been open as between the original parties. Rev. Laws, c. 73, § 33;<sup>6</sup> *Massachusetts National Bank v. Snow*, 187 Mass. 159, 163. We are, therefore, not called upon to decide whether there was other evidence upon which, under suitable instructions, the jury could have found either actual or constructive delivery. It accordingly follows that the ruling requested could not properly have been given, and the case was rightly submitted to the jury.

Exceptions overruled.

## VII. Non-essentials.

### § 25

### MEHLBERG v. TISHER.

24 WISCONSIN, 607. — 1869.

ACTION on the following instrument:

To HOXIE and RICH: Please pay to Chas. Mehlerberg the sum of \$69.20, and charge to me.

CHAS. TISHER.

TOWNSHIP OF MANCHESTER, Feb'y 23, 1881.

<sup>5</sup> N. Y., § 91. — C.

<sup>6</sup> N. Y., § 35. — C.

DIXON, C. J. The written instrument \* \* \* was a bill of exchange. It is not essential to the validity of a bill of exchange that it should be made payable to order, or bearer,<sup>7</sup> or have the words "value received," or be payable at a day certain, or at any particular place. \* \* \*

## § 25

## BROWN v. JORDHAL.

32 MINNESOTA, 135. — 1884.

PLAINTIFF brought this action in the District Court for Freeborn county, as holder of the following instrument:

TOWNSHIP OF MANCHESTER, Feb'y 23, 1881.

§120. Six months after date, (or before, if made out of the sale of Drake's horse hay fork and hay carrier), I promise to pay James B. Drake, or bearer, one hundred and twenty dollars.

Negotiable and payable at the Freeborn County Bank, Albert Lea, Minn., with ten per cent. interest after maturity until paid.

OLE J. JORDAHL [Seal].

[Seal].

Witness: J. WILLIAMSON.

At the trial, before Farmer, J., the plaintiff, having introduced evidence that he bought the note from Williamson for value, before maturity, in good faith and without notice of any defense to it, admitted that the note was obtained from defendant by Williamson by fraud, and that as between those parties the note was without consideration and fraudulent. The court thereupon directed a verdict for defendant, a new trial was denied, and the plaintiff appealed.

GILFILLAN, C. J. The defendant executed an instrument in the form of a negotiable promissory note, except that after and opposite the signature were brackets, and between them the word "seal" thus, "[seal]." The question in the case is, is this a negotiable promissory note, so as to be entitled to the peculiar privileges and immunities accorded to commercial paper? The rule that an instrument under seal, though otherwise in the form of a promissory note, is not (certainly when executed by a natural person, however it may be when executed by a corporation) a negotiable note, entitled to such privileges and immunities, is universally recognized, and is not disputed

<sup>7</sup> Nor to the validity of a promissory note that it should be payable to order or bearer. *Smith v. Kendall*, 6 T. R. 124; *Carnwright v. Gray*, 127 N. Y. 92; *Wells v. Brigham*, 6 Cush. (Mass.) 6. Contra: *Bristol v. Warner*, 19 Conn. 7. The matter as to promissory notes is one of construction of statute, as such notes are the creature of statute. See Neg. Inst. L., § 320. It must be remembered, however, that the Negotiable Instruments Law applies only to negotiable paper. — H.

<sup>8</sup> "The omission of the words 'for value received' does not impair the note, affect its legal import or weaken the presumption that it was given for value." *McLeod v. Hunter*, 29 Misc. (N. Y.) 558, 560. — C.

in this state. But the appellant contends that merely placing upon an instrument a scroll or device, such as the statute allows as a substitute for a common-law seal, without any recognition of it as a seal in the body of the instrument, does not make it a sealed instrument. Undoubtedly, where there is a scroll or device upon an instrument, there must be something upon the instrument to show that the scroll or device was intended for and used as a seal. The scroll or device does not necessarily, as does a common-law seal, establish its own character. Such words in the *testimonium* clause as "witness my hand and seal," or "sealed with my seal," would establish that the scroll or device was used as a seal. No such reference in the body of the instrument was necessary in the case of a common-law seal. (Goddard's Case, 2 Coke Rep. 5a; 7 Bac. Abr. [Bouvier's ed.] 244.) Nor is there any reason to require it in the case of the statutory substitute, if the instrument anywhere shows clearly that the device was used as and intended for a seal. It would be difficult to conceive how the party could express that the device was intended for a seal more clearly than by the word "seal," placed within and made a part of it. This was an instrument under seal.

Order affirmed.<sup>9</sup>

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§ 25

CHRYSLER v. RENOIS.

[Reported herein at p. 85.]

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§ 25

HOGUE v. WILLIAMSON.

[Reported herein at p. 88.]

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<sup>9</sup> Accord: *Warren v. Lynch*, 5 Johns. (N. Y.) 239; *Osborn v. Kistler*, 35 Oh. St. 99; *Osborne v. Hubbard*, 20 Ore. 318; *Muse v. Dantzler*, 85 Ala. 359. The statute (Neg. Inst. L., § 25, subsec. 4), changes the law upon this point. [*St. Paul's Ep. Ch. v. Fields*, 81 Conn. 670, holds a note under seal negotiable under the Negotiable Instruments Law.—C.] Without the aid of statutes the courts had decided that the bill or note of a corporation did not lose its negotiable character because of the presence of the corporate seal. *Chase N. B. v. Faurot*, 149 N. Y. 532; *Mason v. Frick*, 105 Pa. St. 162; *Mackay v. Saint Mary's Church*, 15 R. I. 121; *Central N. B. v. Charlotte, etc., R.*, 5 S. Car. 156. In order to become a common-law specialty the instrument must recite the seal or otherwise indicate the intention of the maker to create a specialty. *Weeks v. Esler*, 143 N. Y. 374; cases *supra*. [Followed in *Matter of Pirie*, 198 N. Y. 209.—C.]

(ii) *Interpretation.*

## VIII. Date.

## § 30

## ALMICH v. DOWNEY.

45 MINNESOTA, 460. — 1891.

ACTION on a promissory note for \$500, brought in the District Court for Le Sueur county. Trial before *Edson, J.*, and verdict for defendants, who appeal from an order granting a new trial.

VANDEBURGH, J. Plaintiff is the indorsee of the note in suit. The note was dated June 25, 1886, and was by its terms payable six months after date. It is alleged in the complaint to have been executed and delivered on the day of its date. It appears from the evidence, however, that the note was actually executed and delivered on the 25th day of June, 1887, and that the date was written 1886, by mistake. There was evidence to go to the jury tending to show that it was indorsed to the plaintiff for value within six months from the actual date of its delivery, but not within six months or before its maturity, according to the face of the note. The court charged the jury, under plaintiff's exception, that if the note, when transferred to plaintiff, was due according to the date as actually expressed therein, and was given without consideration, their verdict must be for the defendants. If a note is antedated or post-dated by the maker, it is a valid contract from the time of its delivery; and, since it is competent to express the agreement of the parties in that way, the courts will construe the instrument according to its terms; and if, when delivered, it is by its date overdue, it will then be treated as a demand note. (1 *Pars.*, Notes and B., p. 49; 3 *Rand.*, Com. Paper, § 1034.) But where the note is intended to bear date as of the time of its delivery, that is the true date; and if by mistake another date is written on the face of the note, the mistake may be corrected, except as to an innocent indorsee or purchaser who would be prejudiced by the correction, and the mistake may be shown by parol. (2 *Pars.*, Notes and B., 514.) As it clearly appeared that the note was given in 1887, and the wrong year inserted in the date by mistake, the note, by intendment of law, was payable in six months from June 25, 1887; and if negotiated and indorsed to the plaintiff before due, in good faith and for value, the defense of want of consideration is not available; and the mistake may in such case be shown as well by the indorsee as the payee of the note. (*Drake v. Rogers*, 32 Me. 524; *Germania Bank v. Distler*, 4 Hun, 633; affirmed in 64 N. Y. 642; 1 *Daniel*, Neg. Inst., § 83; 1 *Edw.*, Bills and N., § 171.)

The mistake should strictly have been alleged in the complaint, but as the evidence was received without objection, and the fact was before the court as if properly pleaded, and considered by the



court in its charge, the objection to the pleading cannot be raised now. The pleading might have been amended formally to conform to the proofs after the evidence was in.

For the reasons stated, it is apparent that the court erred in its charge on this branch of the case, and the order granting a new trial was proper, though based on other grounds. \* \* \*

Order affirmed.

## § 31

### COLLINS *v.* DRISCOLL.

69 CALIFORNIA, 550. — 1886.

BELCHER, C. C. The controlling question in this case relates to the statute of limitations. The action was commenced on the twenty-fourth day of October, 1882, and was based on a promissory note dated May 1, 1878, and payable one day after date, with interest. In the complaint it was alleged that the note was not in fact made or delivered to plaintiff until the fifteenth day of July, 1879; that during the year 1878 the plaintiff loaned to the defendant sums of money, which amounted in the aggregate to the sum named in the note as principal, and which he verbally promised to repay, but made no written promise to do so; that on the fifteenth day of July, 1879, "the defendant, at his own instance, and without any request from plaintiff, caused said note to be prepared, and he signed and delivered the same to plaintiff without being thereto requested or required by the plaintiff; that said note was antedated as aforesaid, at defendant's own instance, for the reason that defendant wished to pay interest on said principal from the first day of May, A. D. 1878, and at the rate in said note specified." The defendant demurred to the complaint, upon the ground that the cause of action was barred by the statute of limitations. The court at first overruled the demurrer, but afterwards reconsidered its ruling, and sustained it, and then entered judgment in favor of defendant.

In our opinion, the first ruling was right and the second wrong. "In general, it is not essential to a note that it should be dated; and if there be no date, it will be considered as dated at the time it was made. If it be dated, the date will be *prima facie* evidence of the time when the note was made, but not conclusive." (1 *Pars.*, Notes & Bills, 41.) A note may be antedated or postdated, and "where the purposes of justice require it, the real date may be inquired into, and effect given to the instrument." (*Story*, Prom. Notes, § 48; *Paige v. Carter*, 64 Cal. 489.) And, whatever may be its date, a note takes effect only on delivery. Until it is delivered it is not made, in a legal sense, and by it no obligation is imposed on the maker. If the delivery be subsequent to the date, it becomes a valid and binding note on the day of its delivery, and not before. "If it be made payable in so many days

or weeks or months from the date, this period must begin from the date which the paper bears, without reference to the day of actual delivery; for it is perfectly competent for the parties to agree that the money should be payable when they please, and they express their agreement on this point by making it payable in so many days from a certain day. Thus, if a note payable in three months from date were delivered four months after date, it would be payable on demand." (1 *Pars.*, Notes & Bills, 49.)

Here, according to the averments of the complaint, which must be taken as true, the note was delivered on the fifteenth day of July, 1879. It was due at that time, and a cause of action at once accrued upon it. Until then there was no cause of action, because there was no note. But the statute of limitations begins to run when the right of action accrues, and never before. This is a general rule, and applies to all actions. Under our statute one has four years in which to bring suit upon a promissory note after his right of action accrues, and his action is never barred until that time has elapsed. As this action was commenced within four years after the plaintiff's cause of action accrued, it is clear the court erred in sustaining the demurrer.<sup>1</sup>

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## IX. Blanks: Authority to fill.

### § 32

### PAGE v. MORREL.

3 ABBOTT'S APPEAL DECISIONS (N. Y.) 433.—1866.

IRA and Orlando Page sued David and Daniel H. Morrel, composing the firm of Morrel & Son, and Benjamin N. Nellis, in the Supreme

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<sup>1</sup> Approved and followed in *Webber v. Webber*, 146 Mich. 31, where, however, it was also held that the note being payable with interest, the interest ran from the date of the instrument and not from the time of its delivery.

But in *Paul v. Smith*, 32 N. J. L. 13, it was held that where at the time a promissory note was made it was antedated a number of years by the agreement of the parties, the statute of limitations begins to run against it from the time it comes due by its terms, and not from the time it was made. The court said in part: "There can be no doubt that the true time when a note was made may be shown if it was wrongly dated by fraud or mistake. A note takes effect only from its delivery, but if delivered after its date, it is then good by relation, and takes effect from its date: *Powell v. Waters*, 8 Cow. 670. A note may be antedated or postdated, and in both cases it is valid if no statute exists to the contrary; and where the purposes of justice require it, the real date may be inquired into, and effect given to the instrument: *Story on Promissory Notes*, § 43. The note in question was due immediately after its delivery. It was not antedated by mistake, or for any unlawful purpose, but to carry into effect the object of the parties. To alter the date, or to give it a legal effect different from that expressed on its face, is not required for the purposes of justice, but would be to make a new bargain for the parties, and thus to do injustice." *ELMER, J.*, at p. 14. — C.

Court, on a promissory note, of which D. Morrel & Son were makers, and Nellis the indorser.

The note was made on June 10, 1859, for the sum of fifty dollars, payable thirty days after date. It was dated June, but with a blank where the day of the month is usually stated, thus: "June —, 1859."

In this condition the note was indorsed by the defendant Nellis for the accommodation of the makers, and on the same day, the tenth, the makers transferred it for value to one Wiles. On the fifteenth of the month, Wiles transferred the note to the plaintiffs for value, and they, without the knowledge of any of the other parties thereto, and of course without their express consent, filled the blank in the date with the figure "1," so as to make the date "June 1, 1859."

The indorser having been charged, on non-payment thirty days after June 1, this action was brought; and the only question was, whether the note was valid against the defendants, notwithstanding the insertion of the figure in the date. The judge found the foregoing facts, and held that the note was valid, and gave judgment for the plaintiffs.

*By the Court* — JAMES C. SMITH, J. — The only question in this case is, whether, as between these parties, the note is rendered invalid, in consequence of its having been antedated by the plaintiffs after the transfer to them, so that it had ten days less to run than it would have had if it had been dated as of the day when it was indorsed and negotiated to Wiles.

There can be no doubt that, if the same day of the month had been inserted by the makers when they negotiated the note to Wiles, without the knowledge of the indorser, the note would not thereby have been rendered invalid, as against the indorser; and so if the day had been inserted by Wiles, with the express direction or consent of the maker. In such case, the note, when indorsed, being perfect in every respect but the date, and that having been left blank, the makers would have had an implied authority from the indorser, to insert any day of the month they might think proper. (*Mitchell v. Culver*, 7 Cow. 336; *M. & F. Bank v. Schuyler*, Id. 337, note.) Such authority results from the general rule, that an indorsement on a blank note, without sum, or date, or time of payment, will bind the indorser, for any sum, payable at any time, which the person, to whom the indorser trusts it, chooses to insert. The date of a note is no exception to this rule, although it is not essential to the validity of a note that the date be expressed; for, where a note has no date, the time, if necessary, may be inquired into, and will be computed from the day it was issued. But it is essential to the free and uninterrupted negotiability of a note that it should be dated, and, therefore, all the parties to a note intended for circulation, are presumed to consent that a person, to whom such a note is intrusted for the purpose of

raising money, may fill up the blank with a date. (*Ib.*) And a blank, left for the day of the month, may be filled with any day in that month, there being no fraud, or express direction to the contrary.

Upon the same principle, Wiles, to whom the note was delivered by the makers, had an implied authority, from both makers and indorsers, to fill the blank with any day in the month.

But it is claimed by the defendant's counsel, that the implied authority, above stated, is restricted to the first holder of a note, and that it was unlawfully exercised by the plaintiff, to whom the note was transferred in blank by Wiles.

That position cannot be maintained. It is immaterial, to the parties to the note, whether the blank in the date was filled by the first holder or his transferee. The latter acquired all the rights of the former in regard to the paper. Until the blank was filled, each successive holder took the note with authority to fill the blank, according to the implied intent of the parties. The reasoning of Justice Bockes upon this point, in the court below, is satisfactory and convincing. The case of *English v. Bruneman* (5 Ark. 377), so far as it holds to the contrary, is not supported by authority.

The judgment should be affirmed.

All the judges concurred, except Morgan, J., who dissented.

Judgment affirmed, with costs.<sup>2</sup>

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## § 32

### BANK OF HOUSTON v. DAY.

122 SOUTHWESTERN (Mo. — ST. LOUIS CT. APP.) 756. — 1909.

ACTION against accommodation indorsers on a promissory note delivered by the defendant McCaskill to the plaintiff about December 1, 1905, and payable four months after date, but not dated. Shortly after, plaintiff's cashier inserted the date December 30, 1905. Judgment for defendants and plaintiff appeals.

NORTON, J. \* \* \* It is conceded throughout the case that the date December 30th was inserted in the note by the cashier without any express authority whatever from either the makers or the indorsers thereon; and, if the testimony of Jack McCaskill is to be believed, it was inserted contrary to his instructions on delivery of the note to the bank. McCaskill testified that he instructed the cashier at the time of delivering the note to insert the date August 30, 1905. Be this as it may, the plaintiff bank does not rely upon any express authority from any one to date the note December 30, 1905, but, on the contrary, relies upon the fact that the note was undated, and that

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<sup>2</sup> See note in 2 A. & E. Ann. Cas. 331, entitled "Implied authority to fill in blanks so as to complete signed instrument." — C.

there was a blank left therein for date at the time of its delivery and the implied authority which, in the absence of express instructions, is assured by the law to the holder of a note, to fill in such blanks as are necessary to either make the obligation complete or render it an appropriate instrument as commercial paper.

The accommodation indorsers only defended the action, and the finding and judgment of the court were for them to the effect that in the absence of directions from McCaskill who delivered the note to the cashier of the bank, or an agreement of some kind to that effect, the cashier was without authority to postdate the note December 30, 1905; in other words, the instructions go to the effect that in the absence of a direction from or agreement with McCaskill, who delivered the note to the bank, which might be regarded as express authority therefor, there is no authority implied by law authorizing the cashier to postdate the note December 30, 1905. The question, therefore, presented for decision is the soundness of the proposition of law announced in these instructions.

Now, there is no doubt where a note is issued without a date and an improper date is inserted therein by the payee and the note is thereafter negotiated to an innocent party or *bona fide* holder without notice that such *bona fide* holder may enforce the same notwithstanding the improper date. This follows for the reason that one who signs such an instrument furnishes the means of fraud, and is estopped to deny his liability thereon. *Mitchell v. Culver*, 7 Cow. (N. Y.) 336; *Frank v. Lilienfeld*, 33 Grat. (Va.) 377; *Redlich v. Doll*, 54 N. Y. 234; *Joyce*, Defenses to Commercial Paper, § 22; *Daniels*, Negotiable Instruments (5th ed.), § 143; *Androscoggin Bank v. Kimball*, 10 Cush. (Mass.) 373. \* \* \*

It is no doubt true that a note issued bearing the month of its issue and the year, with a blank for the day of the month, may be enforced by a subsequent holder, although the day of the month is filled in by him without express authority therefor. Such was the case of *Page v. Morrell*, 3 Abb. Dec. (N. Y.) 433. In such a case it is obvious that the subsequent holder filling in the day of the month is not aware of the particular day on which the note was issued, for he knew nothing of its issue. The paper having come into his hands for value in due course, bearing date the month of June and the year in which it was issued, in the absence of any knowledge whatever as to the date of issue, authority was implied to him to insert any date during the month mentioned. However, that authority is not in point here for the reason that in that case the subsequent *bona fide* holder of the note had no knowledge as to what was the true date of the instrument; whereas, in the present controversy, the subsequent holder of the note (that is, the plaintiff bank), who, it may be said purchased it from Day, the payee, in fact an accommodation party only, knew the day

and date of its issue, and, indeed, with such knowledge occupied the same position in respect of that matter as an original payee who knows the true date of issue; that is, the plaintiff bank knew that it acquired the note about the 1st of December, and not December 30th, for such was the date of issue under the facts in this case. Having this knowledge as between it and these accommodation indorsers, whom McCaskill represented when he delivered the note, it became the duty of the cashier of the bank to insert the date August 30, 1905, as instructed by McCaskill, if his testimony is to be believed. On the contrary, if no instructions whatever were given, then it became the duty of the bank to insert the true date of issue identically as though it were an original payee. \* \* \*

After much careful reading and reflection on the subject, we believe as a general rule between the original parties to the instrument or subsequent holder with notice the original payee or such subsequent holder with notice has implied authority by virtue of the blank contained in the note only to fill in the true date or such a date as was directed or contemplated by the parties. *Daniels*, Negotiable Instruments (5th ed), § 143a, 144; 2 Cyc. 163, 164; 2 Am. & Eng. Enc. Law (2d ed.), 255; *Overton v. Matthews*, 35 Ark. 146; *Emmons v. Meeker*, 55 Ind. 329. It is obvious that what has been said is in accord with the public policy of this state as declared in the new negotiable instrument law approved April 10, 1905. See Laws of 1905. And the note in suit is in all respects subject to that enactment. Section 6<sup>3</sup> of the act referred to declares that the validity of a negotiable instrument is not affected by the fact that it is not dated. Section 12<sup>1</sup> declares that the instrument is not invalid for the reason only that it is antedated or postdated, "provided this is not done for an illegal or fraudulent purpose. The person to whom an instrument so dated is delivered, acquires the title thereto as of the date of delivery." This section seems to contemplate instruments which are antedated or postdated by the parties in accordance with a mutual agreement to that effect, as is frequently done, and declares that they are not invalid because of such fact, provided no illegal or fraudulent purpose is intended. Section 13<sup>2</sup> of the act is as follows: [Quoting it.] It will be observed that this section authorizes the holder of an undated instrument to insert the true date of issue therein and makes the instrument payable accordingly. It provides, too, that the insertion of a wrong date does not avoid the instrument in the hands of a subsequent holder in due course, and, as to him, the date so inserted is to be regarded as the true date. This is in affirmance of the doctrine which obtains in the law merchant, and it implies, at least, that the

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<sup>3</sup> N. Y., § 25.—C. •

<sup>1</sup> N. Y., § 31.—C.

<sup>2</sup> N. Y., § 32.—C.

insertion of a wrong date in an undated instrument by one having knowledge of the true date of issue would avoid the instrument. Such we understand to be the settled doctrine of the cases hereinbefore cited, expounding the principles of the law merchant; that is, that such amounts to an alteration. 2 Am. & Eng. Enc. Law (2d ed.) 142. Now, for one to be a holder of commercial paper in due course, the element of good faith with respect to the same is essential. *More v. Finger*, 128 Cal. 313; *Reese v. Bell*, 138 Cal. xix. Therefore, the present plaintiff, having inserted an untrue date in the instrument when it was possessed of knowledge of the true date of issue, is not a subsequent holder in due course within the meaning of the statute.

Judgment affirmed. All concur.

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§ 33

CAULKINS *v.* WHISLER.

29 IOWA, 495. — 1870.

ACTION upon a promissory note; defense that the instrument is a forgery. The cause was submitted to the court without a jury. The court found the following facts: Defendant entered into a contract with one Smith to sell for him, as his agent, grain seeders. At Smith's request, defendant signed his name upon a blank piece of paper, which Smith was to send to the manufacturers of the seeders, that they might know defendant's signature upon orders which he should make upon them for the machines. The signature was made for no other purpose.

The instrument in suit was printed over the signature of defendant, so obtained, without his knowledge and consent, and the stamp in the same manner attached and canceled. The plaintiff purchased the note before maturity, for a valid consideration, and without knowledge of any matter, connected with its execution. Upon these findings, the court held, that the note is a forgery and void, and that plaintiff is not entitled to recover thereon. Plaintiff appeals.

BECK, J. — A holder of negotiable paper, acquired before dishonor, is not protected against defenses that make void the instrument. He can have no claim upon forged paper against the person whose name is falsely affixed thereto as the maker, and who is without fault as to the forgery and the taking of the paper by the holder. (1 *Parsons*, Bills and Notes, 75, and authorities cited.)

Is the note sued upon a forged instrument? "The making or alteration of any writing with fraudulent intent, whereby another may be prejudiced, is forgery." (*State v. Wooderd*, 20 Iowa, 542; Rev., § 4253.) In order to constitute the offense of forgery it is not necessary that the signature of the instrument be false. The instrument may be altered so that it is not the instrument signed by

the maker, and, if this be fraudulently and falsely done, it is forgery. So if words be added to change its effect, with like intent, it is a forgery. In the case before us the instrument was falsely and fraudulently made over the genuine signature of defendant, which was not obtained for the purpose of binding defendant by any contract. It is evident that this differs, in no respect, from the cases mentioned, and that the note is a forgery and void. (See 2 *Parsons*, Bills and Notes, 584.)

The case differs materially in its facts from the cases cited in support of plaintiff's right to recover. In those cases blanks were filled up contrary to the direction of the maker, or without his authority. But in all such cases the makers intended to execute an instrument that should be binding upon them. Blanks were filled up contrary to the authority given by the makers, or in some other way the instruments were made so that they did not correspond with the intention of the makers; but in all such cases there were *makers* and *instruments*, and through the frauds of those to whom the instruments were intrusted they were thus made to be of different effect than was designed by the makers. In these cases it is correctly held, that while the parties perpetrating the fraud in some cases may have been guilty of forgery, yet the makers were bound upon the instruments, as against holders in good faith and for value. The reason is obvious. The maker ought rather to suffer, on account of the fraudulent act of one to whom he entrusts his paper, or who is made his agent in respect of it, than an innocent party. The law esteems him in fault in thus putting it in the power of another to perpetrate the fraud, and requires him to bear the loss consequent upon his negligence. In the case under consideration no fault can be imputed to the defendant. He did not intrust his signature to the possession of the forger for the purpose of binding himself by a contract. He conferred no power upon the party who committed the crime to use it for any such purpose. He was not guilty of negligence in thus giving it, for it is not unusual, in order to identify signatures, and for other purposes, for men thus to make their autographs. The defendant cannot be regarded as being so far in fault in the transaction that he ought to be required to bear the loss resulting from the crime.

In our opinion the decision of the Circuit Court is in accord with the law, and is therefore

Affirmed.<sup>3</sup>

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<sup>3</sup> See *Walker v. Ebert*, 29 Wis. 194, *post*; *Chapman v. Rose*, 56 N. Y. 137, *post*. — H.



§ 33                    MARKET AND FULTON NATIONAL  
BANK *v.* SARGENT.

85 MAINE, 349. — 1893.

WHITEHOUSE, J. — This was an action on a promissory note for seven hundred and eighty-five dollars, brought by the plaintiff bank as indorsee of Earl B. Chace & Company against the defendant as maker of the note.

The defendant seasonably filed his affidavit that the paper declared on had been materially altered since it was executed.

The facts were not controverted. The defendant had signed a prior note for the accommodation of Chace & Company which was outstanding and overdue at the time of the signing of the note in question. At Chace's request he agreed to sign three other accommodation notes to take up the overdue note, each to be for one-third of the amount. But when the parties met for the purpose of executing this agreement, the amount of the overdue note was not definitely known to either of them, but was understood to be between six hundred dollars and six hundred and fifty dollars. Thereupon, at Chace's suggestion, the defendant signed three printed blank notes and delivered them to Chace, who agreed to fill them out with the requisite amount specified in each, when ascertained, and use them for the purpose of taking up the overdue note. The note in suit is one of the three notes thus signed. But instead of making it for one-third of the overdue note according to his agreement, Chace fraudulently wrote in "Seven hundred and eighty-five dollars" and indorsed the note to the plaintiff bank before maturity in the ordinary course of business, receiving therefor the full amount of the note less fifteen dollars and ninety-six cents discount thereon. It is not claimed, however, that Chace made any alteration in the printed terms of the blank thus delivered to him. He simply inserted in the blank spaces such words and figures as were necessary to constitute the instrument a complete promissory note. There is also positive testimony from the plaintiff's discount clerk that, at the time the note was discounted, the bank had no knowledge of any equities existing between the defendant and Chace, but took the note in the usual course of business. Upon this evidence the presiding justice directed the jury to return a verdict for the plaintiff for the amount of the note in suit.

This instruction was correct. The court may properly instruct the jury to return a verdict for either party when it is apparent that a contrary verdict could not be sustained. (*Heath v. Jaquith*, 68 Maine, 433; *Jewell v. Gagne*, 82 Maine 431; *Moore v. McKenney*, 83 Maine, 80.)

It is well settled and familiar law that, if one affixes his signature to a printed blank for a promissory note and intrusts it to the custody

of another for the purpose of having the blanks filled up and thus becoming a party to a negotiable instrument, he thereby confers the right, and such instrument carries on its face an implied authority to fill up the blanks and complete the contract at pleasure, as to names, terms and amount, so far as consistent with its printed words. As to all purchasers for value without notice, the person to whom a blank note is thus intrusted must be deemed the agent of the signer, and the act of perfecting the instrument is deemed the act of the principal. An oral agreement between such principal and agent limiting the amount for which the note shall be perfected, cannot affect the rights of an indorsee who takes the note before maturity for value, in ignorance of such agreement, with a different amount written in it. (*Bank of Pittsburgh v. Neal*, 22 Howard, 97; *Angle v. Ins. Co.*, 92 U. S. 330; *Bank v. Stowell*, 123 Mass. 196; *Kellogg v. Curtis*, 65 Maine, 59; *Abbott v. Rose*, 62 Maine, 194; *Breckenridge v. Lewis*, 84 Maine, 349; *Bigelow's Bills and Notes*, 571.)<sup>4</sup> \* \* \*

*Exceptions overruled.*<sup>5</sup>

## § 33

## SMITH v. PROSSER.

[1907] 2 KING'S BENCH (COURT OF APPEAL) 735.

THE defendant in South Africa, being about to leave for England, gave to Telfer and another person a power of attorney to act for him in his absence. He further, in anticipation of the possibility of funds being suddenly required during his absence, signed his name on two blank unstamped pieces of paper, which were lithographed forms of promissory notes, and handed them to Telfer with instructions that they should be retained in his custody until the defendant should, by telegram or letter from England, give instructions for their issue as promissory notes and as to the amounts for which they should be filled up. After the defendant had left South Africa, Telfer, without waiting for instructions from the defendant (which were in fact never

<sup>4</sup> If a blank note is entrusted to A. by B., and A. fills the blanks but also adds "with interest, etc." at the end, there being no blank space indicated for such purpose, B. is not liable, since this amounts to a material alteration. *Farmers', etc., N. B. v. Novich*, 89 Tex. 381; *Weyerhauser v. Dun*, 100 N. Y. 150. See Neg. Inst. L., § 206, *post*. So, also, the distinction must be clearly drawn between issuing an instrument with blanks and issuing one in which the blanks have been so imperfectly filled as to leave unoccupied spaces. In the latter case to fill the spaces would be an alteration and would destroy the instrument unless the maker were held to be estopped by the negligent manner in which he sent the instrument into the world. See *post*, Art. IX, Div. I., 3. — H.

<sup>5</sup> See note on "instruments executed in blank and wrongfully filled up" in 11 Am. St. Rep. 316. — C.

given), and in fraud of the defendant, filled in the blanks in the documents so as to make them appear to be promissory notes and sold them to the plaintiff, who took them honestly and in good faith, and without notice of the fraud, and gave full value for them. For the purpose of suing upon them in England, the notes were stamped as foreign bills.

The trial judge found that the notes had not been properly negotiated to the plaintiff, and that he was not entitled to recover. The plaintiff appealed.

FLETCHER MOULTON, L. J. \* \* \*

The law stands thus. If a person signs a piece of paper and gives it to an agent with the intention that it shall in his hands form the basis of a negotiable instrument, he is not permitted to plead that he limited the power of his agent in a way not obvious on the face of the instrument. Notice of such limitation may be given in various ways by the instrument itself. For instance, if in the country where the negotiable instrument is made, a negotiable instrument can only be made on paper bearing an impressed *ad valorem* stamp, the presence of a stamp on the piece of paper would be a notice of limitation of the agent's authority as to the amount of the instrument.

But, in the absence of notice appearing on the face of the instrument, so soon as there is an intention on the part of the signer that the piece of paper shall form the basis of a negotiable instrument, no limitation of the agent's authority can be allowed to affect third parties taking it without notice. But in my opinion there was no such intention here, and the action fails for that reason. I think that the defendant delivered the documents to Telfer (as representing his two attorneys) for safe custody only. No doubt both parties contemplated that the defendant might change his mind, and might direct that the documents, which physically were in the possession of the agent might at some future time be used as the basis of two promissory notes. But that fact does not qualify the purpose for which the instruments were consigned to Telfer. They were handed to him as custodian only, and it is immaterial whether, when they were so handed, the defendant said that the time might come when he might desire to change their character, or whether he made no remark on the subject. Both parties knew that they were delivered for safe custody only. The essential fact which is necessary to enable the plaintiff to establish his case is therefore absent. The defendant never issued the documents with the intention that they should become negotiable instruments. We were pressed with the argument that, as regards third parties, the question of the defendant's intention that Telfer should be the mere custodian of the documents or that he should have power to issue them as notes does not affect his liability, because in either view the possession of the documents enabled Telfer to put them in circulation as promissory

notes. Therefore Mr. Lush, quoting *Lickbarrow v. Mason* (5 T. R. 683) says that there is an estoppel on the defendant independent of any intention that they should become promissory notes. In my opinion this argument goes much too far. If we are to measure the estoppel by the physical possibility of deception, s. 20 of the Bills of Exchange Act would contain something which would be absolutely irrelevant, and which yet is a condition of the section being applicable. That section commences with the words "Where a simple signature on a blank stamped paper is delivered by the signer in order that it may be converted into a bill;" in other words, the intention that it shall be converted into a bill is made a condition of the operation of the section. In my opinion section 20 is based upon the doctrine of common law estoppel as it existed at the date of the act, and therefore the presence of the condition as to its operation shows that the Legislature realized that the intention that the document should be converted into a bill of exchange was essential in order to render the maker liable. In other words, both the common law and the statute realized the possibility of two rival dangers—on the one hand, a person who did nothing more than sign a blank stamped paper might find himself in the position of being the maker of a bill or note, on the other hand, a man might issue an incomplete bill or note and place it in the hands of an agent with a limited authority to fill it up, and the agent might fill it up without due regard to the limitations of his authority and put it in circulation and thereby injure innocent persons. They therefore drew the line as regards the protection of third parties in the following very reasonable and intelligible way: if the signer intended it to become a bill, it was for him to see that it was issued in accordance with his intentions, and if he did not do this, third parties would not be affected; on the other hand, if he did not intend it to become a bill, there would be no such duty incumbent upon him, and he would be in the same position as if he had merely signed it as an autograph. There would in that case be no *animus emittendi*, and he would therefore not be liable for the act of a bailee who turned the document into a negotiable instrument. The present case sharply raises the question of the line of demarcation, and as I think that the signed forms were in the possession of Telfer as custodian only, and not as the defendant's agent with an intention on the defendant's part that he should issue them as promissory notes, the defendant is not estopped from saying that he was not the maker of the notes sued upon. I agree that the appeal should be dismissed.

BUCKLEY, L. J. \* \* \*

The recent decision of this court in *Lloyd's Bank v. Cooke* [*post*, p. 185] has no application to the present case. There the person was entrusted with authority to fill up two promissory notes for a certain amount, and he filled them up for too large an amount. But the

documents were handed to him for the purpose of issue as promissory notes, while here there has never been a negotiable instrument at all, and the authorities as to negotiable instruments have no application. The appeal must therefore be dismissed.

Appeal dismissed.<sup>6</sup>

Vaughan Williams, L. J., also wrote an opinion.

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### § 33 BOSTON STEEL AND IRON CO *v.* STEUER.

183 MASSACHUSETTS, 140. — 1903.

CONTRACT for \$1,823.25 for work done and materials furnished for a building of the defendant numbered 811 on Beacon street in Boston.

At the trial before Bishop, J., without a jury, the judge excluded certain evidence offered by the defendant and refused to make certain rulings requested by the defendant. He found for the plaintiff for \$2,043.86, and the defendant alleged exceptions.

LORING, J. The only question in issue between the parties in this case was the right of the defendant to be credited with two sums, of \$200 and \$400 respectively, under the following circumstances: On December 31, 1898, the defendant's husband owed the plaintiff \$1,781.30, for ironwork furnished by it to him in the construction of a house, No. 819 Beacon street. On being pressed for payment, the defendant's husband, on January 21, 1899, delivered to the plaintiff the defendant's check for \$200 payable to the plaintiff. It is stated in the bill of exceptions that on February 2, 1899, "he paid the plaintiff the further sum of \$400 in a check made by said Jennie D. Steuer." But it appears from the auditor's report, which was before the court and is referred to in the bill of exceptions, that the plaintiff's manager's name was Newcomb, and that his story was that the check for \$400 "was brought to him at his office on Devonshire street by Mr. Steuer in response to further demands for money, and that it was made out in blank and filled up by himself, Mr. Steuer being unwilling that it should be made for more than \$200, while Mr. Newcomb insisted that it should be for the larger amount, and so made it, with Mr. Steuer's consent, and applied it to his debt." The defendant's story was "that she gave the check to Mr. Newcomb at her house."

In addition to the iron furnished the defendant's husband for 819 Beacon street, the defendant's husband had ordered two iron columns and a base plate from the plaintiff for another house, No. 811 Beacon street, which the plaintiff supposed was Steuer's until he told the

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<sup>6</sup> This case is reported in 11 A. & E. Ann. Cas. 191, with note entitled "Liability of maker of blank negotiable instrument to *bona fide* holder where blanks are fraudulently filled in." — C.

plaintiff's manager on March 10th that it belonged to his wife. These two columns and base plate were delivered on December 22, 1898, and at the rate charged in the bill of items were worth \$150.35. From December to March there were negotiations between the defendant's husband and the plaintiff for a contract by which all the ironwork for 811 Beacon street should be furnished by the plaintiff for a fixed sum, payments on account to be made as each floor was finished; and on or about March 1, 1899, the plaintiffs' manager submitted to the defendant a written contract to this effect. On March 10th this was returned by the defendant's husband with the statement already referred to, that 811 Beacon street belonged to his wife, and the contract should be made with her. No written contract was ever made between the plaintiff and the defendant, but the plaintiff went forward and delivered the ironwork for two of the six stories of the house, part being delivered before March 10th and part after that date. The last was delivered on March 18th, when the plaintiff stopped because it had not been paid for what it had done. Thereupon this action was brought to recover the reasonable value for the materials furnished and work done.

At the trial the defendant contended "that the amount of said payments should be credited to her in this action, on the ground that they were payments required by the plaintiff to be made in advance on account of her said building numbered 811 Beacon street, and that the checks were given to her said husband, as her agent, to make such payments," and "offered evidence of her instructions to her husband as to the use and application of said checks, not made in the presence of the plaintiff or anyone representing him, and claimed that the same should be admitted in evidence. The court declined to admit the same, and the defendant duly excepted to the exclusion." The other exceptions taken at the trial have been waived, and the question raised by this exception is the only matter now before us. \* \* \*

The judge before whom the case was tried without a jury found "that neither of said payments was required by the plaintiff to be made in advance on account of her said building numbered 811 Beacon street, and that neither of them was made according to any agreement for payment to be made on account of said 811 Beacon street, and that no floor in said building was completed at the time either of said payments was made by said Bernard Steuer on account of his building numbered 819 Beacon street, and were received by the plaintiff on account therefor."

This finding makes the evidence excluded immaterial so far as the check for \$200 is concerned. If this evidence had been admitted, the defendant's case on the \$200 check would have been this: A check payable to the plaintiff is handed by the drawer to her husband, to be delivered by him to the plaintiff in payment of a debt to become

due from the drawer of the check to the payee, and is fraudulently handed by the husband to the payee of the check in payment of a debt due from him to the payee, and is accepted by the payee in good faith in payment of that debt. In such a case the payee of the check is a *bona fide* purchaser of the check for value, without notice, and the drawer could not set up her husband's fraud in defense of the check, nor maintain an action for money had and received after payment of it on discovering the fraud.

The fact that the plaintiff is the payee of a negotiable security does not prevent him from becoming a *bona fide* purchaser of it, with all the rights incident to a purchaser for value thereof without notice. That was decided in *Watson v. Russell* (3 B. & S. 34), and affirmed in the Exchequer Chamber in the same case (5 B. & S. 968). To the same effect is *Poirier v. Morris*, 2 E. & B. 89, and *Nelson v. Cowing*, 6 Hill, 336, 339. *Munroe v. Bordier*, 8 C. B. 862, and *Armstrong v. American Bank*, 133 U. S. 433, 453, seem to go on this ground. *Fairbanks v. Snow*, 145 Mass. 153, might have been decided on this ground, but was disposed of on common-law principles.

That payment of the pre-existing debt makes the plaintiff a purchaser for value in this commonwealth was settled law before the negotiable instruments act was enacted. *Blanchard v. Stevens*, 3 Cush. 162; *Stoddard v. Kimball*, 6 Cush. 469; *Goodwin v. Massachusetts Loan & Trust Co.*, 152 Mass. 189, 199; *National Revere Bank v. Morse*, 163 Mass. 383; *Holden v. Phoenix Rattan Co.*, 168 Mass. 570.

The checks in question in the case at bar were given after the Negotiable Instruments Act (St. 1898, c. 533; Rev. Laws, c. 73) went into effect, and are governed by its provisions. The plaintiff is a holder in due course of the \$200 check, within Rev. Laws, c. 73, § 69.<sup>7</sup> This section is taken from section 29 of the Bills of Exchange Act of 1882, and *Watson v. Russell* is cited in Chalmers, Bills of Exchange (5th ed.) 89, as an example of a person who is a holder in due course within that section. It was stated by Lord Russell in *Lewis v. Clay*, 67 L. J. Q. B. 224, that a payee of a promissory note cannot be a holder in due course within section 29 of the English Bill of Exchange Act of 1882. In *Hardman v. Wheeler*, (1902) 1 K. B. 361, 372, it was pointed out that this statement of Lord Russell was obiter, and it was also pointed out that in that case, as in *Lewis v. Clay*, it was not necessary to pass on that point. The case of *Watson v. Russell*, 3 B. & S. 34, 5 B. & S. 968, does not seem to have been before the court in either of these cases; and in neither case does the court seem to have taken into consideration the practice of a check being procured, drawn by another, to be used in paying a debt due

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<sup>7</sup> N. Y., § 91. — C.

from the person procuring the check to the person to whom the debtor has had the check made payable. The practice is recognized in the case of foreign bills of exchange, and the person procuring the bill is known technically as the "remitter" of it. See *Munroe v. Bordier*, 8 C. B. 862, where it was held that the payee of a foreign bill, who took it from the remitter of it for value, was a *bona fide* purchaser for value; and this rule was applied in *Watson v. Russell*, 3 B. & S. 34, in case of a check. In our opinion, a check received by the payee named in it, in payment of a debt due from the remitter of the check, is a holder in due course within section 69 of the Negotiable Instruments Act (St. 1898, c. 533; Rev. Laws, c. 73), even if we should follow the decision made in *Herdman v. Wheeler*, (1902) 1 K. B. 361, and hold that a payee never can be a holder in due course to whom the bill has been "negotiated," within the last clause of section 31<sup>8</sup> of our act (Rev. Laws, c. 73) which is taken from section 20 of the English Bill of Exchange Act of 1882 (45 & 46 Vict. c. 61). The rule that payment of a pre-existing debt is value was adopted in Rev. Laws, c. 73, § 42.<sup>9</sup>

But so far as the check for \$400 is concerned, we are of opinion that the evidence should have been admitted. If the defendant's story were found to be true, namely, that she handed the check to the plaintiff's manager at her house, this check would stand on the same footing as the other. But the story of the plaintiff's manager was that the check was brought to him by the defendant's husband, signed in blank by the defendant, and that it was filled up by him for the sum of \$400, with the husband's consent. We assume, in favor of the plaintiff, that this is to be interpreted to mean that the only blank in the check when it was brought to the plaintiff's manager by the defendant's husband was in the amount for which it was to be drawn. It has been held in England that such a piece of paper is not a check; that one who buys it buys an incomplete instrument, and his rights depend upon the real authority which the signer had in fact given in the matter. *Awde v. Dixon*, 6 Ex. 869. See, also, *Hatch v. Searles*, 2 Sm. & G. 147; *Hogarth v. Latham*, 3 Q. B. D. 643; *Watkin v. Lamb*, 85 L. T. (N. S.) 483; *France v. Clark*, 26 Ch. D. 257, 262; *Ledwich v. McKim*, 53 N. Y. 307. Such an incomplete instrument is *prima facie* authority to fill in the blank. *Crutchly v. Mann*, 5 Taunt. 529; *Swan v. North British Australasian Co.*, 2 H. & C. 175, 184. But this *prima facie* authority, as we have said, may be met by evidence of what authority was in fact given, as was done in *Awde v. Dixon*, 6 Ex. 869. If the blanks are filled up before the instrument is negotiated, it does not lie in the maker's mouth to set up that it was incomplete when delivered by him. In such a case, a plaintiff

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<sup>8</sup> N. Y., § 33. — C.

<sup>9</sup> N. Y., § 51. — C.



who buys for value without notice gets the rights of a *bona fide* purchaser for value of a negotiable instrument; and the fact that there was no authority for filling up the blanks as they were filled up, or for otherwise wrongfully dealing with the paper, is no defense. *Schultz v. Astley*, 2 Bing. N. C. 544; *Foster v. MacKinnon*, L. R. 4 C. P. 704, 712.

In this commonwealth it was held, on the other hand, that a note with a blank for the payee's name was a promissory note, and not an incomplete paper, which might be made into a promissory note. *Ives v. Farmers' Bank*, 2 Allen, 236. And in *Frank v. Lilienfeld*, 33 Grat. 377, it was held that the purchaser in good faith of a note in printed form, indorsed by the defendant, where the date, payee's name, and amount had been left blank, had an absolute right to fill in the amount advanced thereon and to fill up the other blanks. It also has been held here, as it has been held in England, that such a blank, in the absence of other evidence, might be filled in by a *bona fide* purchaser (see *Androscoggin Bank v. Kimball*, 10 Cush. 373), and that a *bona fide* purchaser of such a paper, which is filled before it is negotiated, has the rights of a purchaser for value without notice. See *Whitmore v. Nickerson*, 125 Mass. 496, 28 Am. Rep. 257; *Binney v. Globe National Bank*, 150 Mass. 574.

It is not necessary to consider how a blank check would be dealt with in Massachusetts at common law, where the amount in place of the name or date is lacking. The Negotiable Instruments Act (Rev. Laws, c. 73, § 31<sup>1</sup>) adopted the English law on this point, and it follows that, if Newcomb's story is to be believed, the blank check brought to him must be treated as an incomplete instrument, and not as a check.

The defendant further contends that it was inadmissible to show the real authority given to the husband, in the absence of the plaintiff, and cites in support of that contention *Markey v. Mutual Benefit Ins. Co.*, 103 Mass. 79, 93, and *Byrne v. Massasoit Packing Co.*, 137 Mass. 313. These are cases where the act done was within the ostensible scope of the authority given an agent, and for that reason the real authority could not be invoked. The only act relied on as giving ostensible authority to the husband in the case at bar was putting him in possession of the blank check. There was no more ostensible authority here than there was in *Awde v. Dixon*, 6 Ex. 869; *Hogarth v. Latham*, 3 Q. B. D. 643, or *Watkin v. Lamb*, 85 L. T. (N. S.) 483. It was held lately by this court, in *Commercial National Bank v. Bemis*, 177 Mass. 95, 58 N. E. 476, that putting goods in the name of another in a warehouse, and issuing to the other a warehouse receipt therefor, did not give that other ostensible authority to sell,

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<sup>1</sup> N. Y., § 33. — C.

but only held the other out as having possession of the goods represented by the receipt, and that his authority to transfer a title depended upon the real authority given by the owner. Although the possession of an incomplete check gives *prima facie* authority to fill it up, it no more imports ostensible authority than the possession of a warehouse receipt.

The plaintiff's rights under the blank check for \$400, and to the money received for it, depend upon the authority actually given by the defendant when she signed it, and the evidence offered should have been admitted in respect of the credit claimed for the \$400 paid under the blank check.

The entry must be:

Exceptions sustained.

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§ 33

VANDER PLOEG *v.* VAN ZUUK.

135 IOWA, 350. — 1907.

**ACTION** on a promissory note. Plaintiff appeals from judgment on a directed verdict in favor of defendants.

MCCLAINE, J. The facts, established practically without dispute, are that the note for \$2,000, naming the plaintiff as payee, and the two defendants as joint makers with one Pothoven, on which this action is brought, was signed by these two defendants before it was fully completed, being at the time their signatures were affixed thereto a mere blank printed form; that these defendants so signed their names at the request of Pothoven, who was a partner of one of them in a mercantile business, on the representation that he might within a short time find it necessary to raise \$150 or \$200 for temporary use in the business; that Pothoven, being indebted on his individual account to plaintiff on a note for about \$2,000, inserted plaintiff's name as payee, \$2,000 as the amount to be paid, and the rate of interest, and delivered the instrument, filled out by him without authority, to the plaintiff, who thereupon surrendered to him the past-due obligation. It appears in the evidence that the date was filled in by one W. G. Vander Ploeg, who frequently transacted business for the plaintiff, his father, and who knew of the filling of the name of the payee and the amount by Pothoven before the note was delivered to plaintiff; but the final delivery was made directly by Pothoven to plaintiff, and there is a conflict in the evidence as to whether the son had any authority to act for the plaintiff in this particular transaction, or whether plaintiff had any knowledge that his son had so acted for him. If it were material to charge the plaintiff with the knowledge which his son had as to the act of Pothoven in filling out the note, the question should have been submitted to the

jury, and we shall therefore dispose of the case without taking into account any knowledge of or participation in the act of Pothoven in filling out the note, on the part of W. G. Vander Ploeg.

We have, then, the simple case of a note wrongfully filled out and delivered by one of the makers to the payee, without notice to the payee that the instrument as delivered is not filled out in accordance with the authority given by the other makers to the one who thus fills it out and delivers it. With reference to the filling of blanks in an instrument after the affixing of his signature by the maker sought to be charged, the Negotiable Instruments Act (Acts 29th Gen. Assem. p. 81, c. 130; Code Supp. 1902, § 3060a) contains the following section: "Sec. 14,<sup>2</sup> Blanks — when may be filled. Where the instrument is wanting in any material particular, the person in possession thereof has a *prima facie* authority to complete it by filling up the blanks therein. And a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operates as a *prima facie* authority to fill it up as such for any amount. In order, however, that any such instrument when completed may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time. But if any such instrument, after completion, is negotiated to a holder in due course it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time."

It is apparent from the last sentence of this section that, if plaintiff is to be regarded as "a holder in due course," then the instrument is effectual in his hands for all purposes as though it had been filled up strictly in accordance with the authority given by defendants to Pothoven, *i. e.*, defendants would not be allowed to contend as against a holder in due course that Pothoven did not have authority to fill the instrument out for \$2,000; but, under the sentence immediately preceding the last, if plaintiff is not to be treated as a holder in due course, then, as defendants became parties thereto prior to its completion, they are not liable to plaintiff, because it was not filled up in accordance with the authority given. By section 191,<sup>3</sup> the term "holder" is defined as meaning "the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof," and by section 52<sup>4</sup> a "holder in due course" is defined as one who has taken the instrument complete and regular upon its face, before maturity, without notice of previous dishonor, in good faith and for value, and without notice that at the time it was negotiated to him there was

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<sup>2</sup> N. Y., § 33. — C.

<sup>3</sup> N. Y., § 2. — C.

<sup>4</sup> N. Y., § 91. — C.

any infirmity or defect in the title of the person negotiating it. By section 59,<sup>5</sup> "every holder is deemed *prima facie* to be a holder in due course," and by section 57<sup>6</sup> "a holder in due course holds the instrument free from any defect of title of prior parties and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon."

It seems to us under these definitions and the applications thereof the plaintiff was a holder of the note, but not a holder in due course. The latter term seems unquestionably to be used to indicate a person to whom after completion and delivery the instrument has been negotiated. In the ordinary case the payee of the instrument is the person with whom the contract is made, and his rights are not in general dependent on any peculiarities in the law of negotiable instruments. The peculiarities of that law distinguishing negotiable instruments from other contracts relate to a holder who has taken by negotiation, and not as an original party. This is the construction put on the same phrase used in the English Negotiable Instruments Act by Lord Russell, C. J., in *Lewis v. Clay*, 67 L. J. Q. B. 224, in which he says:

"A holder in due course is a person to whom after its completion by and as between the immediate parties the bill or note has been negotiated. In the present case, the plaintiff is named as payee, on the face of the promissory notes, and therefore is one of the immediate parties. The promissory notes held and sued on (by the person named as payee therein) have in fact never been negotiated within the meaning of the act." In *Herdman v. Wheeler*, 1 K. B. (1902) 361, this language of Lord Russell is said to be *dictum*, and it evidently is so, for in the further course of the opinion he points out that, without regard to the definition of that term which he gives, the result would be the same. But the court, in *Herdman v. Wheeler*, holds that if the delivery of a note by one to whom it has been intrusted by the maker for the purpose of delivery after the filling in of the name of the payee, which has been left blank at the time of the affixing of the maker's signature, does not constitute a negotiation, then the payee whose name is thus filled in cannot be a holder in due course. In other words, we think that "holder in due course" should be construed as applicable only to one who takes the instrument by negotiation from another who is a holder. Certainly, in the case before us, Pothoven was not a holder of a promissory note, for as the instrument was delivered to him it was not a note at all, but only a blank form of a note with the makers' names affixed. In *Guerrant v. Guerrant* 7 Va. Law Reg. 639, a case at *nisi prius*, it is held that the holder filling a blank left in the instrument at the time of delivery acts at

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<sup>5</sup> N. Y., § 98. — C.

<sup>6</sup> N. Y., § 96. — C.

his peril as to the authority given by the maker signing the instrument with the name of the payee left blank, and putting it in the hands of another for final delivery, and says that, while this interpretation of the Negotiable Instruments Act involves a change in the law as recognized in that state before the act was passed, such interpretation is required by the language of the act itself.<sup>7</sup> In *Boston Steel & Iron Co. v. Steuer*, 183 Mass. 140, a case decided under the Negotiable Instruments Act as adopted in that state, it is held that one

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<sup>7</sup> The following instructive note to the *Guerrant* case appears in 7 Va. Law. Reg. at p. 642:

“NOTE.—The point decided in this case is one of much importance to bankers and other dealers in commercial paper. The construction here placed upon the Negotiable Instruments Law materially qualifies the familiar rule of the law merchant, that one who issues negotiable paper in an incomplete condition gives the person to whom he intrusts it implied authority to fill the blanks and perfect the instrument; and a transfer thereof to a *bona fide* holder in due course will effectually bind the maker according to the terms of the completed instrument, even though, as between the original parties, there may have been a breach of trust in filling the blanks. See 1 Daniel on Neg. Inst. 142; *Bank of Pittsburg v. Neal*, 22 How. 96; *Frank v. Lilienfeld*, 33 Gratt. 577.

“The point decided is that this rule is altered to this extent, namely, that if a purchaser takes the paper *before the blanks have been actually filled* by the quasi agent, or by a subsequent holder, he is put on notice that the instrument was delivered in an incomplete state, and hence that there may have been some agreement between the maker and the person to whom the instrument was intrusted, by which the authority of the latter was limited—and therefore it is his duty to inquire what these instructions are. Hence he takes the paper at his peril.

“This construction seems inevitable from the language of section 14 of the Negotiable Instruments Law [N. Y., § 33], quoted in the opinion. The conclusion is strengthened by the circumstance that that portion of section 14 here construed is a literal reproduction from section 20 of the English Bills of Exchange Act, where it merely embodies the rule of the law merchant as expounded by the English courts prior to the enactment of the Bills of Exchange Act. See 1 Daniel on Neg. Inst. (4th ed.), 147; *Hatch v. Searles*, 2 Small & Gif. 147; *Aude v. Dixon*, 6 Exch. 869. Norton [Bills and Notes (3d ed.), 259], after stating the general American doctrine on the subject, says: ‘Such is the general rule, at least in the United States, although in England it is held that an unfilled blank charges the purchaser with notice, and that he must at his peril ascertain the extent of the authority conferred.’ Since the enactment, by the English Act, of the rule that notice of an unfilled blank is notice of a possible equity, putting the purchaser on inquiry, was but declaratory of the already existing rule of the law merchant, as understood in England, it necessarily follows that in borrowing, in our Negotiable Instruments Law, the language of the English Act, we adopted also the English interpretation of it.

“Judge Aiken’s ruling seems eminently sound, and the banking community should make a careful note of it. The decision in no wise affects the rights of a holder in due course, who takes the paper after the blanks have been filled, without notice of the situation. How far such a holder would be affected by mere knowledge that blanks had been filled by a previous party to the instrument remains to be decided.”—C.

who signs a check, leaving the name of the payee blank, and instructs another to fill in the proper amount necessary to satisfy the debt of such signer to the payee named, is not bound by the check in the hands of such payee, if it is used by the person thus intrusted with it for the payment of his own debt to the creditor; the amount of such debt being correctly filled in by the creditor. In that case, the person to whom the check was intrusted exceeded his authority in using it for the payment of his own debt, instead of the debt of the signer of the check, and in this respect we think the case is analogous to the one before us. There is language in the opinion with reference to another check which was fully completed as to name of payee and amount, but was also used by the person to whom it was intrusted in violation of his authority in the payment of his own debt, which is not in harmony with our conclusion that the payee to whom the instrument is first delivered cannot be a holder in due course; but in this respect we are not inclined to follow the Massachusetts case.

We do not mean to say that in no case can the person named as payee in a negotiable instrument be the holder thereof "in due course." If A., purchasing a draft to be transmitted to B. in payment of A.'s debt to B., causes the draft to be drawn payable to B., no doubt A. is the holder of such draft, and B. taking it for value becomes a holder in due course. This was true before the passage of the Negotiable Instruments Act. *Armstrong v. American Exchange Nat. Bank*, 133 U. S. 433; *Watson v. Russell*, 3 B. & S. 34, affirmed in 5 B. & S. 968. There is no reason to think the situation of the parties to such a transaction is different under the act. No doubt, the payee named in the promissory note might under similar circumstances be a holder in due course. This is the theory on which the court in *Boston Steel & Iron Co. v. Steuer*, *supra*, holds the payee named in the first of the checks considered in that case to be a holder in due course; but we are unable to understand how the rule is applicable under the facts of the case, for the check was not delivered by the drawer as a valid and complete instrument to the person intrusted with it, but it was given into his hands only for delivery to the payee in extinguishment of the drawer's debt to the payee. Until thus delivered to the payee, it had no validity for any purpose. Before such delivery, the person intrusted with it was not a holder. After such delivery, the payee was a holder, but not, as we think, a holder in due course.

The conclusion which we reach is perhaps different from what it would have been had the Negotiable Instruments Act not been passed. It has been regarded as well-settled law that one who intrusts an incomplete instrument to another to be completed by him and delivered is bound to any one who relies in good faith on the genuineness of such instrument, although the person intrusted with completing and delivering the instrument has exceeded his authority, and this rule

has been held applicable in favor of the payee as well as the transferee of such an instrument. *Chariton Plow Co. v. Davidson*, 16 Neb. 374, 20 N. W. 256; *Androscoggin Bank v. Kimball*, 10 Cush. 373; *Johnson Harvester Co. v. McLean*, 57 Wis. 258; *Fullerton v. Sturges*, 4 Ohio St. 530; *Diercks v. Roberts*, 13 S. C. 338; *Frank v. Lilienfeld*, 33 Grat. (Va.) 377; *Davis v. Lee*, 26 Miss. 505, 59 Am. Dec. 267; *Russell v. Langstaffe*, 2 Doug. (K. B.) 514; 1 *Daniel*, Negotiable Inst. (5th ed.) §§ 142-147, 769-769a; 1 *Randolph*, Commercial Paper (2d ed.) § 181; 2 *Randolph*, Commercial Paper (2d ed.) § 986; 3 *Randolph*, Commercial Paper (2d ed.) § 1875; *Norton*, Bills & Notes (2d ed.) 181; *Clark & Skyles*, Agency, § 60. Indeed, it seems to have been thought immaterial whether or not the person to whom the instrument is made payable and delivered had knowledge that it had been filled out so as to make it an effectual instrument, by one to whom it was intrusted by a maker who had signed it to be filled out and delivered, for it is said that the holder is entitled to assume that the person in whose hands it was placed for final execution had authority to do what he did do in making it an effectual instrument, and is not charged with knowledge of any limitations upon such authority. *Johnson v. Blasdale*, 1 *Smedes & M.* (Miss.) 17, 40 Am. Dec. 85; *Joseph v. First National Bank*, 17 Kan. 256; *Huntington v. Branch Bank*, 3 Ala. 186; 1 *Daniel*, Negotiable Inst. (5th ed.) § 843; *Mechem*, Agency, § 394. This principle is well illustrated by the rule, well settled in this state and elsewhere, that a surety who signs an instrument and intrusts it to the principal maker for delivery is bound, although the principal delivers it in violation of conditions or instructions imposed by the surety on the principal which were not known to the payee. *Sawyers v. Campbell*, 107 Iowa, 397, 56; *Micklewait v. Noel*, 69 Iowa, 344; *Davis Sewing Machine Co. v. Buckles*, 89 Ill. 237; *Smith v. Moberly*, 49 Ky. 266; *Ward v. Hackett* 30 Minn. 150; *Craig v. Hobbs*, 44 Ind. 363; *Brandt*, Suretyship (3d ed.) § 457.

But we must take the Negotiable Instruments Act as it is written, and, while the general purpose was to preserve the existing law so far as it was uniform, yet in many respects in which there was a conflict or doubt under the authorities the language of the statute lays down rules which are not to be ignored simply because in some respects a change in the law is effected. With reference to the language which we have been considering in this very case, taken substantially from section 20 of the English Bills of Exchange Act, the court says, in *Herdman v. Wheeler*, *supra*: "We have been very reluctant to come to the conclusion that the judgment in favor of the defendant in this case was right, because it appears dangerous even to cast any doubt upon a payee's right to recover when he has taken a bill or note complete and regular on the face of it, honestly and for value; but, after carefully considering the matter, we have come to the conclusion that

we should be unfairly straining the words if we did not hold that 'negotiated,' in its proviso at the end of the twentieth section, meant transferred by one holder to another. It is to be observed that the Bills of Exchange Act, in section 2 [section 191 of our act] defines 'issue' as meaning 'the first delivery of a bill or note, complete in form, to a person who takes it as holder. \* \* \*'. There is therefore a technical word defined and used in the act to mean that which [the person intrusted with the completion and delivery of the instrument] did here, and the appropriate words to have used in the proviso of section 20, if it had been intended to include this case, would have been, 'if such instrument after completion is issued or negotiated to a holder in due course.' Those are not the words, and, although we think that the present case might possibly have been decided in the plaintiff's favor before the Bills of Exchange Act was passed, we think that we cannot consistently with the meaning of 'issue' and 'negotiate' in the act hold that the present case is covered by the words used in the proviso. That being so, it falls within the first part of the second subsection of section 20 [*i. e.*, the sentence of our section preceding the last]; and, as the authority of the defendant was not strictly followed, he is not liable."

We see no escape from the conclusion that, under the statute, plaintiff, being not a holder in due course, but the person to whom the note was made payable, and to whom its delivery as an effective instrument was first made, took it subject to the defense that Pothoven had no authority to fill in \$2,000 as the amount of the note and deliver it to plaintiff.

The judgment of the trial court is therefore affirmed.<sup>8</sup>

### § 33

### LLOYD'S BANK, LIMITED, *v.* COOKE.

[1907] 1 KING'S BENCH (COURT OF APPEAL) 794.

ACTION upon a joint and several promissory note for 1,000 pounds by the plaintiffs as payees against the defendants as makers.

The defendant Cooke had an account with the plaintiffs' bank, and the note had been given to the plaintiffs by him as security for an overdraft for 1,000 pounds. On applying to them for the overdraft, he had suggested that he could procure the firm of which he was a member and a relative named Sanbrook to join with him in signing

<sup>8</sup> This case is reported in 13 L. N. S. 490, with note entitled "Right of an innocent payee to recover on a note signed in blank and intrusted to a third person who exceeds his authority in filling up the blanks before delivery to the payee."

See comment on this case and on *Lloyd's Bank v. Cooke*, *post*, p. 185, in 15 Case and Comment, 25 (July, 1908). — C.



a promissory note as security for the advance, and the plaintiffs agreed to advance the money on that security. It appeared that the defendant Cooke had thereupon gone to defendant Sanbrook, and, stating that he was applying for an advance of 500 pounds from the plaintiffs' bank, asked Sanbrook to join in giving promissory notes as security for it. On Sanbrook's agreeing to do so, Cooke produced two blank stamped pieces of paper, to which he induced Sanbrook to put his signature, and which were then handed over to Cooke, it being arranged that he was to fill each of them up as a promissory note payable to the plaintiffs for the amount of 250 pounds. It did not appear what had become of one of these pieces of paper; but the other, which was the instrument upon which the action was brought, was filled up by Cooke as a promissory note for 1,000 pounds, payable to the plaintiffs, the stamp being sufficient to cover that amount, and was signed by him with his own and his firm's name. He then handed it to the plaintiffs, who thereupon made the required advance. The defendant Cooke did not defend the action. It appeared that he had no authority to sign the note on behalf of the other members of his firm, and judgment was accordingly given for them; and, on the authority of *Herdman v. Wheeler*, ([1902] 1 K. B. 361), the trial judge gave judgment for the defendant Sanbrook.

This is an application by the plaintiffs for judgment or for a new trial.

COLLINS, M. R. This is a case of some importance and difficulty, more especially having regard to the fact that, from one point of view, it might involve the question whether the considered judgment of the Divisional Court in *Herdman v. Wheeler*, [1902] 1 K. B. 361, upon the authority of which the learned judge at the trial acted, was correct. \* \* \*

The question appears to me to be purely one of estoppel at common law. It has been contended that the common law doctrine of estoppel does not apply, and that, in the case of a negotiable instrument, the rights of the parties must be ascertained solely by reference to the provisions of the statute relating to such instruments, and that, upon the true construction of those provisions, the plaintiffs cannot maintain the action against the defendant Sanbrook. \* \* \*

That the doctrine of estoppel is applicable to circumstances such as existed in this case appears to me to be conclusively established by \* \* \* the decision of the House of Lords in *Brocklesby v. Temperance Permanent Building Society*, [1895] A. C. 173. The headnote in that case is as follows: "Where a principal intrusts an agent with securities, and instructs him to raise a certain sum upon them, and the agent borrows a larger sum upon the securities, and fraudulently appropriates the difference (the lender acting *bona fide* and in ignorance of the limitation), the principal cannot redeem the

securities without paying the lender all he has lent, although the agent has obtained the loan by fraud and forgery, and although the lender did not know that the agent had authority to borrow at all, and made no inquiry." That case seems to me to be a stronger one than the present; and, unless the doctrine of estoppel is excluded here by reason of the fact that in this case the document was, or was intended to become, a negotiable instrument, it appears to me to be conclusive of the present case. \* \* \*

So far from the fact that the document which was handed to the agent for the purpose of being used as a security, was a negotiable instrument, or was intended to become one, being a reason why the lender of money should be placed in a worse position for asserting a right on the ground of estoppel, it appears to me to be quite the contrary. I think that all the elements which form the foundation of the estoppel are more easily visible where the instrument which is handed over to be used as a security for an advance is in the form of a negotiable instrument than where it is otherwise; for the intention that the security should be used as a means of raising money is more clearly indicated where the document is in its very nature one which is intended to be transferable from hand to hand as a security for money. \* \* \*

There is nothing, in my opinion, in the law as to negotiable instruments as contained in the Bills of Exchange Act, 1882, to prevent the transaction in the present case from being subject to this common law doctrine of estoppel, because the document which was handed over for the purpose of procuring the advance was in the form of a negotiable instrument. \* \* \* Consequently I will pronounce no opinion on the question whether the plaintiffs were entitled to succeed as against the defendant Sanbrook by virtue of the provisions of the Bills of Exchange Act, 1882. On these grounds I think that the application of the plaintiffs for judgment must be allowed.<sup>9</sup>

FLETCHER MOULTON, L. J. I am of the same opinion, and I agree with the reasons given by the Master of the Rolls and Cozens-Hardy.

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<sup>9</sup> The view taken in this opinion that the Bills of Exchange Act, 1882, does not operate to prevent the application to negotiable instruments of common law principles, is approved in 12 Law Notes, 123 (October, 1908), where it is maintained that the same doctrine should be applied with respect to the American Negotiable Instruments Law. To the same effect, see 15 Case and Comment, 25, 26 (July, 1908), where it is said: "In expressly saving the rules of the law merchant in cases not provided for in the act, the American statute does not, like the English act, mention common-law rules; but this seems immaterial for the reason that neither statute was intended to codify rules of the common law beyond the scope of the law merchant." See also *Marling v. Fitzgerald*, 138 Wis. 93, where the court, in answer to the contention of counsel that a certain section of the Negotiable Instruments Law controlled, said that "Those rules . . . give way to the supreme rule of *estoppel in pais*." P. 100. — C.

L. J.; but I wish to add a few observations with reference to the argument based upon section 20 of the Bills of Exchange Act, 1882, which was pressed upon us by the counsel for the defendant Sanbrook. In cases in which a blank stamped paper has been signed and delivered by the signer in order that it may be converted into a bill, subsection 2 of section 20 provides that "in order that any such instrument when completed may be enforceable against any person who became a party thereto prior to its completion, it must be filled up within a reasonable time, and strictly in accordance with the authority given." It was urged that this provision is an absolute limitation upon all claims based on such an instrument (whether by way of estoppel or otherwise), and that the only way in which a person so claiming can escape from that limitation is by bringing himself within the proviso to the subsection, which provides that "if any such instrument after completion is negotiated to a holder in due course it shall be valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up within a reasonable time, and strictly in accordance with the authority given," and it was contended that the plaintiffs had failed to bring themselves within the words of this proviso because they were not "holders in due course."

In order to agree with this view, one would have to come to the conclusion that it was intended by the Bills of Exchange Act, 1882, to make an essential change in the law with regard to negotiable instruments by shutting out the payee of such an instrument, who had given full value without notice of anything wrong, from the advantages of the position of a *bona fide* holder for value. Before the Bills of Exchange Act, 1882, it would, in my opinion, have been impossible to contend that a payee of a promissory note who took it under circumstances such as existed here was not entitled to recover the full amount of the note from the maker of it. A long line of most emphatic judgments shows that, before the Act, a person who, like the defendant Sanbrook, chose to sign a bill or note in blank, and hand it to another person to be filled up, would, under circumstances such as exist in this case, be liable to the payee for the full amount for which the instrument was filled up, provided that it was not greater than the stamp would cover, so that an action such as this would then have been an undefended action. The contention of the counsel for the defendant amounts, therefore, to saying that the Act has made this important change, namely, that it has taken away the right of a payee to recover under such circumstances, leaving only the rights of an indorsee in this respect unchanged.

I cannot accept that view. I can see no indication in the Act of any intention to make such a radical change in the law, a change which does not commend itself to one's sense of justice, and which, if intended, would surely have been made formally and explicitly, and not left to be gathered by mere implication. And, apart from the

absence of any indication that such a serious change in the law is intended to be made, there are many things in the Act which lead me to the opposite conclusion. In the first place, I am satisfied that the term "holder in due course," which is used in the Act, is intended to be the equivalent of the term "*bona fide* holder for value" which was used prior to the Act, and which would, in my opinion, have included a payee who had given full value for the bill or note in good faith. This appears from the judgment of Lord Selbourne in *France v. Clark* (26 Ch. D. 257, at p. 262), in which he uses the expression "*bona fide* holder for value" in a sense which must include a payee who has given value in good faith. He says: "The person who has signed a negotiable instrument in blank or with blank spaces is (on account of the negotiable character of that instrument) estopped by the law merchant from disputing any alteration made in the document after it has left his hands by filling up blanks (or otherwise in a way not *ex facie* fraudulent) as against a *bona fide* holder for value without notice; but it has been repeatedly explained that this estoppel is in favor only of such a *bona fide* holder." Now, as I have said, the courts always held a payee entitled to the benefit of this estoppel if he took the instrument *bona fide* and without notice, and therefore we have the authority of Lord Selborne in favor of the view that the term "*bona fide* holder for value" may include a payee; and, if the term "holder in due course" in the Bills of Exchange Act, 1882, is intended to be the equivalent of "*bona fide* holder for value," it must include such a payee.

But it will perhaps be said that one ought not primarily to be guided in the interpretation of such an Act by considerations of what was the previous state of the law. The Act in its definition clause defines in a statutory manner the meaning of the terms used in it, and, although there is a strong presumption against any serious change in the general law being intended, it is, after all, a question of the interpretation of the statute, and these definitions must be implicitly followed. This is true, but the application of this principle only strengthens the view I have enunciated. When I look at the definition of "holder" in the Bills of Exchange Act, 1882, section 2, I find that, so far from its indicating any intention to create a difference of status between a holder who is a payee and a holder who is an indorsee, or to put a payee in any worse position in this respect than an indorsee, the contrary is the case. The Act takes special care to place them on an equality, for it defines "holder" as meaning the "payee or indorsee of a bill or note who is in possession of it, or the bearer thereof." Therefore, unless the context compels us to do otherwise, we must construe the term "holder" as including a payee. I next find that in section 30, subsection 2, of the Act it is provided that "every holder of a bill is *prima facie* deemed to be a holder in due course," and that, if it is wished to dislodge him from that posi-

tion, it must be shown that there has been fraud or some other like circumstance in connection with the bill before it reached his hands, and even this only shifts the burden of proof and makes it incumbent on him to prove that he gave value in good faith.

These provisions specifically give to the payee the *prima facie* status of a "holder in due course," and, if he can show that value has in good faith been given by him for the bill, that *prima facie* status cannot be displaced.

It is suggested, however, that these conclusions are negated by the language of section 29, subsection 1, which states the conditions under which a person is a "holder in due course." I can find nothing in the language of that subsection which throws any doubt on the view that "holder in due course" would include a payee who has given value in good faith, unless we are to construe the word "negotiated" as being merely equivalent to "indorsed." But, when the definition of "negotiation" given by section 31, subsection 1, is looked at, it appears clear that the Legislature intended to make it apply also to the original operation of transferring the bill to the payee. It lays down that "a bill is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder of the bill." It carefully abstains from prescribing that the transferor must be a "holder." All that is necessary to constitute "negotiation" of the bill is that it should have been transferred from one person to another in such a manner as to constitute the transferee the "holder of the bill," *i. e.* — if we replace "holder" by its definition in the Act — "the payee or indorsee who is in possession of the bill." A cheque, therefore, payable to a particular person, which is handed by the drawer to that person for value, would be "negotiated" within the meaning of the Act.

These considerations lead me to the conclusion that the Act did not intend to impair the position of a payee as contrasted with that of an indorsee, and that a payee who has given value in good faith is intended to come within its provisions as a "holder in due course" just as much as an indorsee. Finding, therefore, no indication in the Act of any intention to interfere with the position of a payee of a negotiable instrument in this respect, I arrive with some confidence at the conclusion that, in the circumstances of a case like the present, such a payee since the Act still occupies the favorable position which he would have had before the Act by virtue of the law of estoppel as applied to a case where a promissory note has been signed in blank by the maker and intrusted to another person to fill up.

*Application allowed.*<sup>10</sup>

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<sup>10</sup> This case is reported in 8 A. & E. Ann. Cas. 182, with note entitled, "Liability of maker of blank negotiable instrument to *bona fide* holder where blanks are fraudulently filled in." — C.

## § 33

## MADDEN v. GASTON.

137 APPELLATE DIVISION (N. Y.) 294. — 1910.

ACTION by Charlotte F. Madden against George H. Gaston, as executor of the last will and testament of Eliza Wilson, deceased. Appeal from a judgment entered on a dismissal of the complaint at the close of the plaintiff's evidence, in a suit on two checks, alleged to have been signed by the defendant's testatrix in blank and delivered to the plaintiff and thereafter by her filled out with the amounts of \$5,000 and \$10,000, respectively. The answer put in issue the making of the checks, their delivery, the consideration, and due filling out of the blanks. The plaintiff proved the signature of the maker of the checks and offered them in evidence; but they were excluded by the court upon the ground that there was no proof of the authority given to fill up the blanks. The plaintiff then called the defendant, who testified that, on the day before the death of his testatrix, he had a conversation with the plaintiff, and then saw the checks in question or similar papers.

MILLER, J. The production of the checks by the plaintiff raised a presumption of a valid and intentional delivery of them to her by the maker. Section 35 of the Negotiable Instruments Law (chapter 38 of the Consolidated Laws). Such delivery operated as *prima facie* authority to fill up the blanks for any amount. Section 33 of the Negotiable Instruments Law. The learned trial court was, therefore, wrong in holding that it was incumbent upon the plaintiff to prove her authority to fill up the blanks, as the statute imposes the burden upon the defendant to show the agreement, and that its terms have been violated, if that be claimed; and that was the rule at common law. *Davidson v. Lanier*, 4 Wall. 447. Said section 33 also provides:

"In order, however, that any such instrument, when completed, may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time."

It seems to me that there can be no presumption one way or the other as to the time within which the blanks were filled up. Therefore, the burden was upon the plaintiff, who asserted it, to prove that the blanks were filled up within a "reasonable time." It is alleged in the complaint that the blank checks were delivered on the 22d of October, 1907. The maker died on the 9th of June, 1908. There is evidence which, perhaps, would justify the inference that the defendant saw the checks on the 8th of June in their present condition. Other than that, there is nothing to show when the checks were filled up, and certainly from October 22, 1907, to June 9, 1908, is, unexplained, more than a "reasonable time." However, the plaintiff could only prove one thing at a time. The checks were excluded upon a ground which the plaintiff could not obviate, and that ruling virtually

ended the case. Wherefore, the plaintiff should be permitted another opportunity to prove her case.

The judgment should be reversed, and a new trial granted, with costs to appellant to abide event. All concur.

## **X. Ambiguous language.**

### 1. DISCREPANCY BETWEEN WORDS AND FIGURES.

## **§ 36 WITTY *v.* MICHIGAN MUTUAL LIFE INS. CO.**

123 INDIANA, 411. — 1889.

BERKSHIRE, J. — This was an action brought by the appellee against the appellant on the following writing:

\$147.70.

INDIANAPOLIS, IND., Nov. 28, 1883.

Four months after date I promise to pay to the order of the Michigan Mutual Life Ins. Co. — dollars —, and five per cent. attorney's fees thereon per annum from date until paid, value received, without relief from valuation or appraisement laws of the State of Indiana. The indorsers jointly and severally waive presentment for payment, protest, and notice of protest, and non-payment of this note, and expressly agree, jointly and severally, that the holder may renew or extend the time of payment hereof from time to time, and receive interest in advance or otherwise from either of the makers or indorsers for any extension so made, without releasing them hereon.

Negotiable and payable at ———.

J. B. WITTY.

Mar. 28, 31, '84, Indiana.

The appellee, in its complaint, did not ask for a reformation of the instrument, but relied on it as a promissory note complete in itself.

The appellant answered by the general denial only.

The cause was submitted to the court at Special Term, and a finding made for the appellee. The appellant filed a motion for a new trial, which the court overruled, and he excepted.

An appeal was taken to General Term, and upon the errors assigned the judgment at Special Term was affirmed, and from the judgment in General Term this appeal is prosecuted.

There is but one question presented for our consideration. Is the written instrument, as it appears in the record, an enforceable obligation? We are of the opinion that it is, if not so otherwise, by virtue of § 5501, R. S. 1881, and is negotiable by indorsement.

It is signed by the appellant, and when taken as an entirety we think it contains a promise to pay \$147.70, together with five per cent. attorney's fees. By the very terms of the instrument the appellant obligates himself to pay to the appellee "dollars," and it is expressly recited that this promise rests upon a valuable consideration. No one can read the writing without at once coming to the conclusion that the appellant intended to obligate himself to the appellee for the payment of some definite amount of money, and that the appellee understood that it was receiving such an obligation.

Though there may be some formal imperfections in a written obligation or contract which parties have entered into, if it contains matter sufficient to enable the court to ascertain the terms and conditions of the obligation or contract to which the parties intended to bind themselves, it is sufficient. In the language of Lord Campbell, in *Warrington v. Early* (2 Ellis & Bl., 763), "the effect of a written contract is to be collected from all within the four corners of the document," and no part of what appears there is to be excluded. We can imagine no good reason why the marginal figures upon the writing in question should be disregarded.

We know as a part of the commercial history of the country that the universal practice has been for a period so long that the memory of man runneth not to the contrary, to represent by superscription in figures upon all obligations for the payment of money the amount or sum which is written in the body of the instrument. The superscription is always intended to represent the amount found in the body of the instrument, and not a different amount; if, therefore, an obligation is found where there is a promise to pay "dollars," but the *number of dollars* in the body of the instrument is blank, and the margin of the instrument is found to contain a superscription which states the number of dollars, why, in view of the usage or custom which has so long prevailed, should the body of the instrument not be aided by the superscription? We think, in such a case, the figures found in the margin should be taken as the amount which the obligor intended to obligate himself to pay, and the obligation enforced accordingly. We do not think, in such a case, that the courts would be justified in disregarding the evident intention of the parties as indicated by the superscription upon the paper, and in holding the instrument void for uncertainty, or on the ground that it is not a perfect writing. And especially are we of the opinion stated, in view of the liberal statute which we have on the subject of promissory notes and other written obligations and their negotiation. (Section 5501, *supra*.)

In the case under consideration the action is between the original parties to the instrument, and upon it in the form and condition in which it was executed, and, therefore, we do not think it would be profitable to consider questions which might arise where the obligation is made payable at a bank, the blank number of dollars afterwards filled in by the payee and indorsed by him to an innocent holder for value before maturity. \* \* \*

We find no error in the record.

Judgment is affirmed, with costs.<sup>1</sup>

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<sup>1</sup> A note for *three* hundred dollars, the figures being \$300, is good for three hundred dollars, if the maker intended it to be for three hundred. *Burnham*



§ 36 MEARS *v.* GRAHAM, 8 Blackf. (Ind.) 144. — 1846. BLACKFORD, J. — The circumstance that the figures in the margin of the note are “\$331.15” and the words in the body are “three hundred and thirty-three dollars and fifteen cents,” does not affect the validity of the note. The words in the body must govern, and the note is therefore for \$333.15.

## 2. INTEREST, HOW COMPUTED.

§ 36 CAMPBELL PRINTING PRESS, ETC., CO. *v.* JONES, 79 Alabama, 475. — 1885. CLOPTON, J. — The principle seems to be settled, that a promissory note payable at a future day, *with interest*, bears interest

*v. Allen*, 1 Gray (Mass.), 496. A bill payable in the United States for “3,000,” “three thousand —,” omitting the dollar-mark and the word “dollars,” is a valid bill for three thousand dollars. *Williamson v. Smith*, 1 Cold. (Tenn.) 1. — H.

[Accord: *Kimball v. Costa*, 76 Vt. 289. In this case the figures “\$385” were in the margin, and the body of the note read: “For value received, I hereby promise to pay F. E. Kimball or order the sum of F. E. Kimball dollars, \$50 payable August 9, 1902, and \$50 every two months thereafter until note is paid,” etc. TYLER, J., said: “The writing of the name ‘F. E. Kimball’ after the words ‘the sum of’ was clearly a clerical error, and the name in that place should be read out of the note. . . . The words, three hundred and eighty-five dollars, should be read into the body of the note. The defendant had no right to understand that \$50 or \$100 was all there was to be paid. The figures in the margin were notice to him of the amount for which the note was given.” Reported in 1 A. & E. Ann. Cas. 610, with note entitled, “Object and effect of marginal figures in bills and notes.”

Contra: *Chestnut v. Chestnut*, 104 Va. 539. In this case the figures “\$1,800” were in the margin, and the body of the note contained a promise “to pay to the order of J. A. Chestnut ——— dollars,” etc. It was held error for the trial court to permit the plaintiff to put in evidence the note in its incomplete form. BUCHANAN, J., said: “The propriety of the court’s ruling depends upon the question, whether or not the figures and words in the margin of a note fix the amount for which the note was intended to be given, where no amount has been inserted in the blank left for it in the body of the note. Upon this question the decisions of the courts are not in accord, though the weight of authority, and the better reason, seems to be in favor of the view that the sum named in the margin is generally the limit of the amount with which a *bona fide* holder may fill up the blank, but until so filled the instrument is incomplete, and no recovery can be had upon it [citing, among other authorities, *Norwich Bank v. Hyde*, 13 Conn. 281, a leading case on the subject]. . . . The reason for this rule of construction is that one of the essential requisites of a bill or note is that the amount for which it is made must be clearly expressed in the instrument, and as the marginal figures are not generally regarded as a part of it, but are intended as a convenient index, and as an aid to remove ambiguity or doubt in the instrument itself, they cannot supply the omission to insert the amount in the body of the instrument where a blank has been left for that purpose.” P. 541. Reported with note in 2 L. N. S. 879. — C.]

from date, it being considered as a part of the debt. (*Dorman v. Dibden*, R. & M. 280; *Richards v. Richards*, 2 B. & Ad. 447; *Lerzenberg v. Cleveland*, 19 La. An. 473.) \* \* \* Otherwise, the words, *bearing legal rate of interest*, would be without meaning and operation. Such is the legal effect after maturity, without express stipulation. In *Kennedy v. Nash* (1 Starkie, 452), Lord Ellenborough held, "that under the words, *bearing interest*, the plaintiff was entitled to recover interest from the date of the bill, since, without any such words, he would be entitled to interest from the time when the bill became due." The obligation of the note is to pay the principal, with interest. To limit the time when the interest begins to run, to maturity, is to presume that the parties contemplated the notes would not be paid when payable, and therefore provided they should bear interest thereafter. In order to give some effect to all the terms of the notes, our conclusion is, that the interest runs from date.<sup>2</sup>

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### 3. INSTRUMENT NOT DATED.

§ 36 *RICHARDSON v. ELLETT*, 10 Texas, 190.—1853. *HEMPHILL*, CH. J.—Nor is the judgment excessive, as charged by the plaintiff in error. It is true that the note, as copied in the petition, does not bear any date; but the petition avers it to have been executed on the 8th day of January, 1850, a fact not controverted by the defendant. By its terms the instrument bears interest from its date, and it appears to have been accurately estimated.<sup>3</sup>

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### 4. CONFLICT BETWEEN WRITTEN AND PRINTED PROVISIONS.

§ 36 *AMERICAN EXPRESS CO. v. PINCKNEY*, 29 Ill. 392.—1862. Action for negligence in collecting a draft. The question arises on the construction of a partly printed and partly written receipt by defendant. *BREESE*, J.—The principle applicable in all such cases is, that a writing must be construed according to the clear intent of the parties, if that can be collected from the face of the instrument. \* \* \* But there is another principle of law applicable. In a case where the agreement is partly written and in part printed, the preference is always given to the written part. What is printed is intended to apply to large classes of contracts, and not to any one exclusively; the blanks are left purposely, that the special statements or provisions should be inserted which belong to the particular contract,

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<sup>2</sup> Interest on notes payable on demand runs only from the time of demand. *Hunter v. Wood*, 54 Ala. 71; *Dodge v. Perkins*, 9 Pick. (Mass.) 369. — H.

<sup>3</sup> See Byles on Bills (13th ed.), p. 79. See, as to date, §§ 25, 30, *ante*. — H.

and not to others, and thus to discriminate this from others. So Lord Ellenborough held, in the case of *Robertson and Thomasson v. French* (4 East, 360), when he said, that words superadded in writing are entitled, if there should be any reasonable doubt upon the sense and meaning of the whole, to have a greater effect attributed to them, than to the printed words, inasmuch as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning, and the printed words are a general formula adapted equally to their case, and that of all other contracting parties, upon similar occasions and subjects. \* \* \*

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## 5. DOUBT WHETHER BILL OR NOTE.

§ 36

FUNK *v.* BABBITT.[Reported herein at p. 150.]<sup>4</sup>

§ 36

COMMONWEALTH *v.* BUTTERICK.

[Reported herein at p. 113.]

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## 6. IRREGULAR SIGNATURE.

§ 36

GERMANIA NATIONAL BANK *v.* MARINER.

[Reported herein at p. 210.]

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## 7. JOINT AND SEVERAL LIABILITY.

§ 36

DART *v.* SHERWOOD.

7 WISCONSIN, 523. — 1858.

THIS is an action of assumpsit brought by the appellee against the appellants, as joint makers of a promissory note, which read as follows:

\$400.

RIPON, WIS., Nov. 4th, 1856.

Thirty days after date, for value received, I promise to pay Putnam C. Dart, or order, four hundred dollars, with interest, at the rate of twelve per cent. per annum.

J. C. SHERWOOD.  
WM. C. SHERWOOD,  
Surety.

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<sup>4</sup> See also *Peto v. Reynolds*, 9 Exch. 410, note, *ante*, p. 150; and compare *Watrous v. Holbrook*, 39 Tex. 573, *ante*, p. 148. — H.

On the trial the plaintiff offered the note in evidence, and the defendants made two objections to the reading of the same: \* \* \* 2. That the note did not show a joint liability. The court allowed the note to be read, and the plaintiff rested his case. The defendants moved for a nonsuit on the ground that there was a mis-joinder of parties defendant. This motion was denied.

Judgment for plaintiff. Defendants appeal.

*By the Court* — WHITON, C. J. — The judgment of the court below is correct and must be affirmed. The note declared upon is the joint and several note of the defendants; joint because it is signed by both; and several, because each defendant promised severally. (*Story* on Promissory Notes, § 57; *Hunt v. Adams*, 5 Mass. R. 358; *Same v. Same*, 6 do. 519.) \* \* \*

The judgment of the circuit court must, therefore, be affirmed.<sup>5</sup>

# **XI. Ambiguous signatures.**

## **§ 37**

## **ANDENTON v. SHOUP.**

17 OHIO STATE, 125. — 1866.

**ACTION** against George W. Shoup on the following instrument:

DAYTON, August 11, 1861.

Dayton Branch, State Bank of Ohio, pay to J. B., or bearer, two hundred thirty dollars.  
\$230.

SAMUEL SHOUP, Agent.

Allegation that Samuel Shoup was defendant's agent and acted as such in drawing the check; that plaintiff is holder in due course; that the check was duly presented and was dishonored, etc.

Demurrer sustained and judgment for defendant. Plaintiff appeals.

DAY, C. J. — The averments in the petition will not warrant the claim in argument, that this is a case where a party himself uses a name other than his own in the transaction of his business. The most that can be claimed is, that the principal allowed the agent to sign his own name as agent in the transaction of some of the business of the principal. \* \* \*

It is undoubtedly well settled that, where an ordinary simple contract is signed by an agent in his own name, with the addition of the word "agent" thereto, the principal may be made liable thereon, whether his name appears on the paper or not. (*Story* on Agency, § 160a, and authorities there cited.) But, for commercial reasons, a distinction is taken, in the authorities, between contracts of this class and negotiable paper. As to bills of exchange, it is said that the agent

<sup>5</sup> Accord: *Monson v. Drakeley*, 40 Conn. 552; *Ely v. Clute*, 19 Hun (N. Y.) 35; *Wallace v. Jewell*, 21 Oh. St. 163. — H.

“must either sign the name of the principal to the bill, or it must appear on the face of the bill itself, in some way, that it was drawn for him, or the principal will not be bound.” (Edw. on Bills, 80; Chitty on Bills, 27.)

The question as to the liability of the principal, on paper executed by an agent in his own name, was well considered by the Supreme Court of Massachusetts, in the cases of the *Eastern Railroad Company v. Benedict* (5 Gray, 561), and the *Bank of America v. Hooper* (Ib. 567.)

In the latter case, it is said that “there will be found to be a leading distinction taken between cases of commercial paper in the form of bills of exchange and negotiable promissory notes, and other simple contracts, holding that no one but a party to such negotiable paper can be sued for the non-payment thereof.” In support of this distinction the following authorities are there cited: (*Byles on Bills* [5th ed.], 26; *Emily v. Lye*, 15 East, 7; *Becham v. Drake*, 9 M. & W. 92; *Pent v. Stanton*, 10 Wend. 276; *Stackpole v. Arnold*, 11 Mass. 27; *Bedford Com. Ins. Co. v. Covell*, 8 Met. 442; *Taber v. Cannon*, Id. 456.)

The case of *De Witt v. Walton* (5 Seld. 571), decided by the New York Court of Appeals, is a strong case to the same point. It was a suit brought on a negotiable promissory note, signed “David Hubbell Hoyt, agent for ‘The Churchman.’” Hoyt was an agent for a paper called “The Churchman,” and was authorized to contract for the proprietor in that name, and the suit was against the proprietor, Hoyt’s principal. It is said in the opinion, that “the good sense of many authorities upon this subject would seem to be, that, where a party is sought to be charged upon an express contract, it must at least appear upon the face of the instrument that the agent undertook to bind him as principal. Here the promise is not by the defendant or ‘The Churchman,’ nor by Hoyt for them or either of them, or in their behalf, but for himself. The formula used by him in the signature to the note in controversy has been determined, in this and other states, to create an obligation on the part of the agent personally, and not in behalf of the principal. There is no great hardship in requiring that if a man undertakes to oblige another, by note, bill of exchange, or other commercial instrument, he should manifest his purpose clearly and intelligibly, or that his principal will not be bound, whatever may be the result in reference to himself.”

It was further held in this case, that the words added to the name of the person signing the paper was merely *descriptio personæ*.

The principle maintained in these cases, it is said by the author of the notes in Smith’s Leading Cases (vol. 2, p. 433), “would seem to be well settled on both sides of the Atlantic.”

These principles applied to the case before us are decisive of it.

The name of the defendant is in no way indicated upon the face of the instrument upon which alone the action is based.

It follows, therefore, that the ruling of the court below was correct, and that the judgment rendered by it must be affirmed.<sup>6</sup>

# § 35 WESTERN WHEELED SCRAPER CO. v. McMILLEN.

71 NEBRASKA, 686. — 1904.

ACTION on a note reading "we promise to pay" and signed: "Directors of Thedford Irrigation and Power Co. (Limited). J. M. McMillen, G. W. Miller, G. L. Matthews." Judgment for defendants and plaintiff brings error.

DUFFIE, J. — \* \* \*

The court, in its seventh instruction, told the jury: "You are further instructed that if you should believe from a preponderance of all the evidence in this case that the three notes set out in plaintiff's petition were made and executed by the Thedford Irrigation & Power Company, Limited, and if said notes were signed by said defendants with the intention and understanding to bind the Thedford Irrigation & Power Company, Limited, and not the signers of said notes as individuals, and if you should find from a preponderance of all the evidence that it was so understood by and between the agent of plaintiff and these defendants at the time said notes were executed and delivered, then your verdict should be for the defendant, 'No cause of action.'" The jury returned a verdict for the defendants, and the plaintiff has brought the record to this court for review.

The petition in error, among other matters, alleges "that the court erred in permitting the defendants to introduce oral testimony tending to prove a different contract than that set out in the written contract, namely, the notes sued upon," and in giving the instruction above quoted and other instructions, which it is unnecessary to discuss. The general rule undoubtedly is that, on account of the qualities which the law annexes to negotiable instruments, none are bound except those who appear on the face of the instrument as bound, and accordingly that extrinsic evidence cannot be admitted to charge parties whose names do not appear on the face of the instrument. \* \* \* It is undoubtedly true that the modern cases are more liberal than was formerly the case in allowing one who signs a negotiable instrument, designating himself as agent or trustee, to show by parol evidence that he was acting for another, who received all the

<sup>6</sup> See *N. Y. Life Ins. Co. v. Martindale*, 75 Kan. 142, reported in 21 L. N. S. 1046, with exhaustive note entitled, "Liability of principal on negotiable paper executed by an agent." — C.

benefits of the consideration for which the note was given. *Keidan v. Winegar*, 95 Mich. 430, 20 L. R. A. 705, is a case in point, and other cases referred to in the notes of the editor will furnish examples of the relaxation of the rule adopted by the courts at an earlier date upon this question. If this court had not put itself on record, we should be disposed to follow the modern decisions, but as early as 1886, in *Webster v. Wray*, 19 Neb. 558, the court, after a full review of the authorities, held that "no party can be charged as principal upon a negotiable note or bill of exchange unless his name is thereon disclosed;" and it was further held in that case that parol evidence was not admissible to show that one who appeared upon the face of the notes to be the maker was in fact acting as agent for another, or as the officer of some corporation who had received the benefit of the consideration. This case was followed by *Andres v. Kridler*, 47 Neb. 585, where suit was brought upon a note made and signed substantially in the manner of those in suit, and it was held that, "where the pleadings disclose a cause of action against a defendant personally, superadded words, such as 'agent,' 'executor,' or 'director,' should be rejected as *descriptio personæ*." We think this court is now fully committed to the doctrine that, in order to exempt an agent from liability upon an instrument executed by him within the scope of his agency, he must not only name his principal, but he must express by some form of words that the writing is the act of the principal, though done by the hand of the agent. If he expresses this, the principal is bound, and the agent is not. But a mere description of the general relation or office which the person signing the paper holds to another person or to a corporation, without indicating that the particular signature is made in the execution of the office and agency, is not sufficient to charge the principal or to exempt the agent from personal liability. There was evidence which would fully support a finding that in executing these notes the defendants did not intend to bind themselves personally, and that the plaintiff's agent was not only fully aware of that fact, and understood that he was taking the notes of the corporation, but assisted and advised as to the form in which the notes should be drawn in order to make them the obligation of the corporation. This being the case, the defendants, upon a proper plea, would be entitled to have the notes reformed to express the real intention of the parties. *Western Wheeled Scraper Company v. Stickleman et al.*, 122 Iowa, 396, and authorities there cited.

We recommend, therefore, that the case be reversed, and remanded to the District Court, with directions to allow the defendants to amend their answer, if they so elect; otherwise to enter judgment for the plaintiff for the amount due upon the notes.

KIRKPATRICK and LETTON, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment is reversed, and remanded to the District Court, with direc-

tions to allow the defendants to amend their answer, if they so elect; otherwise to enter judgment for the plaintiff for the amount due upon the notes.<sup>7</sup>

§ 39

KEIDAN v. WINEGAR

95 MICHIGAN, 430. — 1893.

MCGRATH, J. Plaintiff had judgment upon the following promissory note: “\$336.96-100. Grand Rapids, Mich., Dec. 22, 1887. Ninety days after date, I promise to pay to the order of Geo. Keidan three hundred thirty-six and 96-100 dollars at the Old National Bank of Grand Rapids, Mich., value received, with interest at the rate of eight per cent. per annum until paid. W. S. Winegar, Agt.” Defendant, with his plea, filed an affidavit setting forth “that the note, a copy of which is attached to the declaration in said cause, and served upon said deponent, with a copy of said declaration, is not the note of this deponent, defendant as aforesaid; and he denies the same and the execution thereof, and says that he, said defendant, is not indebted to

<sup>7</sup> In *Rendell v. Harriman*, 75 Me. 497, the note read “we promise to pay” and was signed

“ OTIS HARRIMAN	} President
R. M. TREVETT	
L. MUDGETT	
W. H. GINN	
	Directors of
	Prospect and Stockton
	Cheese Company.”

In an action by the payee against *Harriman et al.*, as individuals, the defendants offered evidence to show that the note, when delivered to the payee, was intended, to his knowledge, to be the obligation of the Cheese Company alone. Held that the evidence was inadmissible and that the defendants were liable as individuals. DANFORTH, J., said: “It is true, that in the cases cited, such evidence was admitted and was perhaps admissible, under the well established rule of law, that when there is an ambiguity in the contract, when the language used is equally susceptible of two different constructions, evidence of the circumstances by which the parties were surrounded and under which the contract was made may be given, not for the purpose of proving the intention of the parties independent of the writing, but that the intention may be more intelligently ascertained from its terms. But to make this evidence admissible some ambiguity must first appear; there must be language used such as may without doing violence to its meaning, be explained consistently with the liability of either party, some language which as in *Simpson v. Garland*, 72 Me. 40, tends, in the words of the statute, to show that the contract was made by the agent ‘in the name of the principal, or in his own name for his principal.’ In this case no such ambiguity exists, no such language is used. The promise is that of the defendants alone without anything to indicate that it was for or in behalf of another. True, the defendants affixed to their names their official title, with the name of the corporation in which they held office, but nothing whatever to qualify their promise or in the slightest degree to show it other than their own. The statute as well as the decisions, with few exceptions, as we have seen, requires more than this to make the testimony admissible.” P. 503. — C.



said plaintiff upon said note, nor for any part thereof, nor is he indebted to said plaintiff in any sum whatever, nor in any manner whatever.' Upon the trial defendant offered to show that in 1884, before plaintiff had any dealings with defendant, plaintiff was informed that defendant was carrying on business as the agent of Maggie G. Winegar, and was not doing business for himself; that business relations were then established between plaintiff and said Maggie G. Winegar; that said business relations continued from the early part of 1884 to and including the year 1887, and embraced many transactions between plaintiff and Maggie G. Winegar; that many instruments were made between the parties, which were signed exactly as the note sued upon is signed, and that this form of execution had come to be recognized and adopted between the parties as binding Maggie G. Winegar; that during that time no business was transacted by the defendant in his individual capacity, and all the business done was that of his principal, and known and understood to be such by plaintiff; that the said note was given and accepted as the obligation of Maggie G. Winegar; that the note was given for duebills and goods furnished by plaintiff to Maggie G. Winegar on the books of plaintiff; that the taking of these notes did not in the least change the character of the indebtedness; and that defendant never received any benefit or consideration for said note. The court refused to admit the testimony, and directed a verdict for the plaintiff.

The clear weight of authority is that the promise in the present case is *prima facie* the promise of William S. Winegar, and, as between one of the original parties and a third party, the addition of the word "agent" is not sufficient to put such third party upon inquiry. The question here, however, is whether, as between the immediate parties to the instrument, parol evidence is admissible to show the real character of the transaction. \* \* \* In *Kean v. Davis*, 47 Amer. Dec. 182, Chief Justice Green says: "The question is not, what is the true construction of the language of the contracting party, but, who is the contracting party? Whose language is it? And the evidence is not adduced to discharge the agent from a personal liability which he has assumed, but to prove that in fact he never incurred that liability; not to aid in the construction of the instrument, but to prove whose instrument it is. Now, it is true that the construction of a written contract is a question of law, to be settled by the court upon the terms of the instrument. But whether the contract was in point of fact executed, when it was made, and by whom it was made, are questions of fact, to be settled by a jury, and are provable in many instances by parol, even though the proof conflicts with the language of the instrument itself." \* \* \* To the rule that extrinsic evidence cannot be received to contradict or vary the terms of a valid instrument, there are many exceptions. As between the original parties, the consideration may be impeached;

fraud or illegality in its inception may be shown. It may be shown that the note was delivered conditionally, or for a specified purpose, only; that it was made for accommodation, merely; if, by mistake, one party indorses before another, such mistake may be shown to relieve him from his apparent liability; that a party who indorses his name upon the back of a note may be maker or indorser, dependent upon parol proof as to when he placed his signature; that, although the legal effect of successive indorsements is to make the indorsers liable to each other in the order of time in which they signed their names, yet such legal effect may be rebutted by parol proof that all were accommodation indorsers, and, by agreement among themselves, cosureties: that the fact of a note being joint and several did not exclude proof that one of the signers was a surety, merely, and, where the creditor knew the fact of suretyship, an extension of time, for a consideration, without the consent of such surety, released the surety.

\* \* \*

As is so often said, it is the intent of the parties which is to be carried out by the courts. The rule that rejects words added to the signature is an arbitrary one. Its reason is not so much that the words are not, or may not be, suggestive, but that they are but suggestive, and the instrument, as a whole, is not sufficiently complete to point to other parentage. The very suggestiveness of these added words has given rise to an irreconcilable confusion in the authorities as to the legal effect of such an instrument. Extrinsic evidence, therefore, is admissible in such case, between the immediate parties, to explain a suggestion contained on the face of the instrument, and to carry out the contract actually entered into as suggested, but not fully shown, by the note itself. The presumption that persons dealing with negotiable instruments take them on the credit of the parties whose names appear should not be absolute in favor of the immediate payee, from whom the consideration passed, who must be deemed to have known all the facts and circumstances surrounding the inception of the note, and with such knowledge accepted a note containing such a suggestion. \* \* \* We think that in the present case defendant was entitled to make the showing offered. Under the general issue, defendant was entitled to give in evidence any matter of defense going to the existence of any promise having legal force, as against him. *I Shinn*, Pl. & Pr., § 740.

The judgment is reversed, and a new trial ordered. The other justices concurred.<sup>8</sup>

<sup>8</sup> This case is reported in 20 L. R. A. 705, with exhaustive note entitled, "Admissibility of extrinsic evidence to show who is liable as the maker of a note."

Accord: *Megowan v. Peterson*, 173 N. Y. 1. In this case the note read, "I promise to pay" and was signed "Charles G. Peterson, Trustee." HAIGHT, J.,

## § 39

CHIPMAN *v.* FOSTER ET AL.

119 MASSACHUSETTS, 189. — 1875.

CONTRACT against the defendants as drawers of three drafts indorsed in blank by the payees, of which the following is a copy:—

FOSTER & COLE, General Agents for the New England States, 15 Devonshire Street, Boston.	No. 176. <span style="float: right;">\$5,000.</span> NEW ENGLAND AGENCY OF THE PENNSYLVANIA FIRE INSUR- ANCE COMPANY, PHILADELPHIA. BOSTON, August 18, 1873. Pay to the order of Haley, Morse & Company, five thou- sand dollars, being in full of all claims and demands against said company for loss and damage by fire on the thirtieth day of May, 1873, to property insured under policy No. 824, of Boston, Mass., agency. FOSTER & COLE. To the Pennsylvania Fire Insurance Company, Philadelphia.
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Defendants were general agents of the Pennsylvania Fire Insurance Company of Philadelphia, and drew the drafts in question in pay-

after quoting section 39 of the Negotiable Instruments Law, said: "He did not, in the instrument itself, disclose the fact that he was trustee for the creditors of Johnson & Peterson, so that, under the provisions of this statute, he would become personally liable upon the note, unless he could show that at the time of the delivery of the note to the plaintiffs he disclosed the fact that the consideration for which the note was given was for the benefit of the creditors of Johnson & Peterson, and that he gave the note as the trustee for such creditors. It is contended on behalf of the plaintiffs that his representative character must be disclosed upon the face of the note. This may be so in so far as innocent purchasers for value are concerned, but as to the payees named in the note we think a different rule prevails. In the case of *Bank v. Wallis*, 150 N. Y. 455, the action was upon a promissory note signed by Wallis, who added to his signature 'President,' and by Smith, who added to his signature 'Treasurer.' They were in fact president and treasurer of the Wallis Iron Works, a corporation, and the note was issued as an obligation for the corporation, and was discounted by the plaintiff bank. It was held that the plaintiff was entitled to recover upon the ground that the representative characters of the defendants were not disclosed to the bank at the time that it discounted the paper. ANDREWS, C. J., in delivering the opinion of the court, said with reference thereto: 'It may be admitted that if the bank, when it discounted the paper, was informed or knew that the note was issued by the corporation, and was intended to create only a corporate liability, it could not be enforced against the defendants as individuals, who, by mistake, had executed it in such form as to make it on its face their own note, and not that of the corporation. But, according to the rules governing commercial paper, nothing short of notice, express or implied, brought home to the bank at the time of the discount, that the note was issued as the note of the corporation, and was not intended to bind the defendants, could defeat its remedy against the parties actually liable thereon as promisors.' We do not understand that the statute to which we have alluded was designed to change the common-law rule in this regard, which is to the effect that, as between the original parties and those having notice of the facts relied upon as constituting a defense, the consideration and the conditions under which the note was delivered may be shown." Pages 4, 5. — C.

ment of three policies issued by that company, The company refused to honor the drafts, and they were duly protested.

GRAY, C. J. — Each of these drafts, upon its face, purports to be issued by the New England agency of the Pennsylvania Fire Insurance Company, and shows that Foster & Cole are the general agents of that corporation for the New England States, as well as that the draft is drawn in payment of a claim against the corporation. It thus appears that Foster & Cole, in drawing it, acted only as agents of the corporation, as clearly as if they had repeated words expressing their agency after their signature; and they cannot be held personally liable as drawers thereof. *Carpenter v. Farnsworth*, 106 Mass. 561, and cases cited.

Judgment for the defendants.

§ 39

CASCO NATIONAL BANK *v.* CLARK.

139 NEW YORK, 307. — 1893.

ACTION against defendants as makers of a promissory note. Judgment for plaintiff. The opinion states the facts.

GRAY, J. — The action is upon a promissory note, in the following form, viz.:

RIDGEWOOD ICE Co.

BROOKLYN, N. Y., August 2, 1890.

\$7,500. Three months after date, we promise to pay to the order of Clark & Chaplin Ice Company, seventy-five hundred dollars at Mechanics' Bank: value received.

JOHN CLARK, *Prest.*

E. H. CLOSE, *Treas.*

It was delivered in payment for ice sold by the payee company to the Ridgewood Ice Company, under a contract between those companies, and was discounted by the plaintiff for the payee, before its maturity. The appellants, Clark and Close, appearing as makers upon the note, the one describing himself as "Prest." and the other as "Treas.," were made individually defendants. They defended on the ground that they had made the note as officers of the Ridgewood Ice Company, and did not become personally liable thereby for the debt represented.

Where a negotiable promissory note has been given for the payment of a debt contracted by a corporation, and the language of the promise does not disclose the corporate obligation, and the signatures to the paper are in the names of individuals, a holder, taking *bona fide*, and without notice of the circumstances of its making, is entitled to hold the note as the personal undertaking of its signers, notwithstanding they affix to their names the title of an office. Such an affix

will be regarded as descriptive of the persons and not of the character of the liability. Unless the promise purports to be by the corporation, it is that of the persons who subscribe to it; and the fact of adding to their names an abbreviation of some official title has no legal significance as qualifying their obligation, and imposes no obligation upon the corporation whose officers they may be. This must be regarded as the long and well-settled rule. (Byles on Bills, §§ 36, 37, 71; *Pentz v. Stanton*, 10 Wend. 271; *Taft v. Brewster*, 9 John. 334; *Hills v. Bannister*, 8 Cow. 31; *Moss v. Livingston*, 4 N. Y. 208; *DeWitt v. Walton*, 9 Id. 571; *Bottomley v. Fisher*, 1 Hurlst. & Colt. 211.) It is founded in the general principle that in a contract every material thing must be definitely expressed, and not left to conjecture. Unless the language creates, or fairly implies, the undertaking of the corporation, if the purpose is equivocal, the obligation is that of its apparent makers.

It was said in *Briggs v. Partridge* (64 N. Y. 357, 363), that persons taking negotiable instruments are presumed to take them on the credit of the parties whose names appear upon them, and a person not a party cannot be charged, upon proof that the ostensible party signed, or indorsed, as his agent. It may be perfectly true, if there is proof that the holder of negotiable paper was aware, when he received it, of the facts and circumstances connected with its making, and knew that it was intended and delivered as a corporate obligation only, that the persons signing it in this manner could not be held individually liable. Such knowledge might be imputable from the language of the paper, in connection with other circumstances, as in the case of *Mott v. Hicks* (1 Cow. 513), where the note read, "the president and directors promise to pay," and was subscribed by the defendant as "president." The court held that that was sufficient to distinguish the case from *Taft v. Brewster*, *supra*, and made it evident that no personal engagement was entered into or intended. Much stress was placed in that case upon the proof that the plaintiff was intimately acquainted with the transaction out of which arose the giving of the corporate obligation.

In the case of *Bank of Genesee v. Patchin Bank* (19 N. Y. 312), referred to by the appellant's counsel, the action was against the defendant to hold it as the indorser of a bill of exchange, drawn to the order of "S. B. Stokes, Cas.," and indorsed in the same words. The plaintiff bank was advised, at the time of discounting the bill, by the president of the Patchin Bank, that Stokes was its cashier, and that he had been directed to send it in for discount, and Stokes forwarded it in an official way to the plaintiff. It was held that the Patchin Bank was liable, because the agency of the cashier in the matter was communicated to the knowledge of the plaintiff as well as apparent.

Incidentally, it was said that the same strictness is not required in the execution of commercial paper as between banks, that is, in other respects, between individuals.

In the absence of competent evidence showing or charging knowledge in the holder of negotiable paper as to the character of the obligation, the established and safe rule must be regarded to be that it is the agreement of its ostensible maker and not of some other party, neither disclosed by the language, nor in the manner of execution. In this case the language is, "we promise to pay," and the signature by the defendants, Clark and Close, are perfectly consistent with an assumption by them of the company's debt.

The appearance upon the margin of the paper of the printed name "Ridgewood Ice Company" was not a fact carrying any presumption that the note was, or was intended to be, one by the company.

It was competent for its officers to obligate themselves personally, for any reason satisfactory to themselves, and, apparently to the world, they did so by the language of the note; which the mere use of a blank form of note, having upon its margin the name of their company, was insufficient to negative.

[The court then decides that the fact that one Winslow was a director in the payee company, and also in the plaintiff bank, did not charge the latter with notice as to the origin of the paper.]

Judgment affirmed.\*

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## ENGLISH AND SCOTTISH AMERICAN MORTGAGE AND INVESTMENT COMPANY v. GLOBE LOAN AND TRUST COMPANY.

70 NEBRASKA, 435. — 1903.

ALBERT, C. This action was brought by the English & Scottish American Mortgage & Investment Company against the Globe Loan & Trust Company, Emma O. Devries, as administratrix of the estate of H. O. Devries, deceased, and W. Beach Taylor, on a promissory note, of which the following is a copy:

\$982.13.

OMAHA, NEB., March 1st, 1898.

GLOBE LOAN & TRUST CO., OMAHA, NEBRASKA.

On or before two years after date, we promise to pay to the English & Scottish American Mortgage & I. Co., or order, nine hundred and eighty two and 13/100 Dollars, for value received; negotiable and payable at the office of the Globe Loan & Trust Company, Omaha, Nebraska, with interest at the rate of six per cent. per annum from date until maturity.

GLOBE LOAN & TRUST CO.,

H. O. DEVRIES, *Presdt.*

W. B. TAYLOR, *Secy.*

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\* See extract from *Megowan v. Peterson*, 179 N. Y. 1, in note on p. 203. — C.

Only the last-named defendant is concerned in the litigation at this time. As a defense to the note, he pleaded that it was the note of the trust company alone, and that he signed as secretary in order to give it effect as the obligation of such company, and for no other purpose. On the trial of the issues joined between the plaintiff and Taylor, the former offered the note in evidence; and it was excluded on the ground that it appeared on the face of the note that it was the obligation of the trust company, and not the personal obligation of such defendant. Judgment was given for Taylor, and the plaintiff brings error.

The sole question in this case is whether the note, on its face, shows a personal liability on the part of Taylor. If it does, the judgment of the District Court is wrong, and should be reversed.

The plaintiff contends that the mere addition of the official title of an officer of a corporation to his signature on a note does not make it the note of the corporation, and that a note thus signed is the personal obligation of the officer thus signing it. Among the authorities cited in support of this contention are the following: *Andres v. Kridler*, 47 Neb. 585; *Hays v. Crutcher*, 54 Ind. 261; *Scott v. Baker*, 3 W. Va. 285; *Rendell v. Harriman*, 75 Me. 497; *Bank v. Clark*, 139 N. Y. 307; *Tucker Mfg. Co. v. Fairbanks*, 98 Mass. 101. In none of the foregoing cases, however, is the name of the corporation itself attached to the note as maker; and those cases appear to rest on the familiar rule that, where an agent signs a negotiable instrument in his own name, without disclosing on the face of the instrument the name of his principal, he is personally liable thereon. But in the present case the name of the corporation is attached to the note, and is followed by that of Devries and Taylor, with the designation of their respective titles. In *American National Bank v. Omaha Coffin Mfg. Co.*, 95 N. W. 672, this court held that a note signed: "Omaha Coffin Mfg. Co. C. A. Clafin, Presdt. S. L. Andrews, Sec." — was the note of the corporation, and that the officers whose names were attached thereto were not liable thereon. The doctrine announced in that case is supported by the following: *Liebscher v. Kraus*, 74 Wis. 387; *Reeve v. First Nat. Bank*, 54 N. J. Law, 208; *Draper v. Steam Heating Co.*, 5 Allen, 338; *Castle v. Foundry Co.*, 72 Me. 167; *Falk v. Moebbs*, 127 U. S. 597.

In the cases just cited but one signature followed that of the corporation, and in *American National Bank v. Omaha Coffin Mfg. Co.*, *supra*, the liability of the second officer signing the instrument was not necessarily involved; and on that ground the plaintiff undertakes to distinguish between those cases and the case at bar, and insists that while it may be presumed that Devries, in signing the note, intended merely to indicate by whom the corporate signature was affixed to the instrument, no such presumption is to be indulged as to Taylor, because the signature of Devries, to which is attached his official

designation, following the name of the corporation, is sufficient of itself to indicate by whom the corporate signature was affixed. The plaintiff's argument on this point is agreeably plausible, but not convincing. While the law would have presumed a corporate obligation, had the name of the corporation been followed by the official signature of the president alone, there is no presumption that such is the sole method of attesting the corporate signature. It is not unusual for corporations to require that instruments intended to bind them shall be executed by more than one of their officers. And where, as in this instance, the corporate name is followed by the signatures of two of its officers, to which are attached the respective titles of such officers, the presumption which attends the signature of the first officer should be held to attend that of the second as well. This view is in harmony with modern methods and common usage. Instruments thus signed pass current as corporate obligations only, and outside of a courtroom no one ever acts upon them in the belief that they bind, or were ever intended to bind, the officers thus signing them, or any person other than the corporation itself.

We have not overlooked *Heffner v. Brownell*, 70 Iowa, 591, wherein the officers were held liable on a note signed precisely as the one in suit. But that case is contrary to the doctrine announced by this court in *American National Bank v. Omaha Coffin Mfg. Co.*, *supra*, and, as we think, to the weight of modern authority.

It is recommended that the judgment of the District Court in favor of Taylor against the plaintiff be affirmed.

Barnes and Glanville, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the District Court in favor of Taylor against the plaintiff is affirmed.<sup>10</sup>

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<sup>10</sup> See report of this case in 6 A. & E. Ann. Cas. 999, with exhaustive note entitled, "Liability of person signing negotiable paper as officer of corporation."

Accord: *Aungst v. Cregue*, 72 Oh. St. 551, where the note read "we promise to pay" and was signed "The Akron White Sand and Stone Co. L. K. Mihills, Sec'y and Treas. D. B. Aungst, Pres."

Held that on its face it was the note of the company alone, and not the note of Mihills and Aungst, and that the latter were not personally bound thereon. CREW, J., said: "But it is contended by counsel for defendant in error in the present case that the note here in question, because of the language employed in the body of the instrument itself, imports on its face an undertaking on the part of all whose names are signed thereto that they will be bound thereon, and that in terms it imposes upon each a personal liability as a maker of said note. Counsel assume that the use of the words 'we promise to pay,' in the body of the instrument, is conclusive of the fact that this note is and was intended to be the joint note of the Akron White Sand & Stone Company, L. K. Mihills, and D. B. Aungst. We do not think so, and, in our judgment, no such controlling effect can properly be given these words. The word 'we,' when used in a promissory note, does not always or necessarily imply a plurality of makers, and it is often used, as will appear from many



## § 39 GERMANIA NATIONAL BANK OF MILWAUKEE v. MARINER.

129 WISCONSIN, 544. — 1906.

WINSLOW, J. The plaintiff sued the appellant and the Northwestern Straw Works as makers of the following promissory note:

MILWAUKEE, *January 6, 1905.*

Four months after date the Northwestern Straw Works promise to pay to the order of F. G. Bigelow (\$20,000) Twenty Thousand Dollars at the First National Bank, Milwaukee. Value received.

THE NORTHWESTERN STRAW WORKS,  
E. R. STILLMAN, *Treas.*  
JOHN W. MARINER.

The defendants answered jointly, alleging that the note was the note of the Northwestern Straw Works (a corporation) alone, and was signed by Mariner as secretary of the corporation and not in his individual capacity. The case was tried without a jury, and the evidence showed without dispute that the plaintiff purchased the note from the payee in due course and for value before due; that it represented a loan made to the corporation defendant alone; that the by-

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of the cases cited in this opinion, to designate or describe a corporation aggregate. It is said in *Randolph on Commercial Paper*, § 143, that "We promise" seems the natural form of words for a corporation's promise, if the name itself is not used in the body of the note." In *Draper v. Massachusetts Steam Heating Co. and another*, 5 Allen, 338, the note in suit read, 'We promise to pay,' and the signing was similar to that in the case at bar, viz.: 'Mass. Steam Heating Co. — L. L. Fuller, Treasurer.' HOAR, J., in the opinion in that case, says: 'The name of the company is signed to the note. This signature could not be made by the corporation itself, and must have been written by some officer or agent. It was manifestly proper that some indication should be given by whom the signature was made, as evidence of its genuineness; and Fuller added his own name, with the designation of his official character. It would have been better if the name of the principal had been inserted in the body of the contract as the contracting party, or if the word "by" had preceded Fuller's name in the signature. But we think the omission to do this does not change the apparent character of the instrument, and that the whole, taken together, shows it to be the signature of the Massachusetts Steam Heating Company, and not of Fuller.' Page 555.

After citing a large number of cases the court says: "In all of the above cases the notes were held to be unambiguous, and to be the notes of the corporations alone." P. 558.

But to the other extreme, see *Mathews & Co. v. Mattress Co.*, 87 Iowa, 246, where the note read "we promise to pay" and was signed, "Dubuque Mattress Co., John Kapp, Pt." Held, that, upon the face of the note, Kapp was personally liable, and that even in an action between the immediate parties to the instrument oral testimony was inadmissible to show that he was at the time president of the company, and authorized to sign notes for it, that the note was given for goods sold to the company, and was intended to bind it alone, and that the payee knew that fact when he took it.

See, also, *Rendell v. Harriman*, 75 Me. 497, in note on p. —. — C.

laws of the corporation required its notes to be signed by two officers, either the president or treasurer and the secretary; that Mr. Stillman was the treasurer of the corporation and Mr. Mariner the secretary; that Mr. Mariner signed his name thereto simply for the purpose of making it the note of the corporation, and not intending to bind himself, but neglected to add the word "Secretary" to his name; that the plaintiff had no information as to the capacity in which Mariner signed the note, further than that afforded by the note itself; and that the defendant corporation went into bankruptcy after the maturity of the note and made a composition with its creditors under which there was paid to the plaintiff on the note \$4,020. There was no proof that the corporation had ever held out to the plaintiff or the public that Mr. Stillman or any single officer had authority to execute notes for it. Upon these facts the court, upon motion, ordered the complaint amended so as to charge Mr. Mariner as indorser, found him liable as such, and entered judgment against him for the balance due upon the note, from which judgment Mariner appeals.

The question as to the liability of Mariner under the facts stated is certainly not free from difficulty. The general rule is well supported that when it clearly appears, either in the body of the note or by appropriate words added to the signatures themselves, that a corporation is the party making the promise, there is no individual liability on the part of the signers. 1 *Randolph* on Com. Paper (2d ed.) § 135. In an early case in this state, however (*Dennison v. Austin*, 15 Wis. 334), this principle was, in effect, modified, as it is modified in some other jurisdictions, by a proviso to the effect that, if the signers in fact had no authority to bind the corporation, they bind themselves individually. The Negotiable Instrument Law (chapter 356, p. 682, Laws of 1899) recognizes both the general principle and the proviso, in section 1675-20<sup>1</sup> (page 694), in these words: "Where the instrument contains or a person adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument, if he was duly authorized."<sup>2</sup> As it appears without dispute in the present case that the signers of the note were authorized to execute it on behalf of the corporation, the proviso need not be considered. In the present case the body of the note declares that the "Northwestern Straw Works" (presumably a corporation) is the promisor. It does not say "I" or "we" promise to pay, but specifically names a corporation as the promisor. Hence, so far as Mr. Stillman is concerned, the note itself makes it clear that he signed only on behalf of the corporation. Parol evidence would not be admissible to show that he signed as a joint

<sup>1</sup> N. Y., § 39. — C.

<sup>2</sup> See the extract from Mr. McKeehan's article on the Negotiable Instruments Law, *post*, pages —. — C.

maker. *Liebscher v. Kraus*, 74 Wis. 387. The same claim is forcibly made as to the signature of the defendant Mariner, and it is not without authority to support it. *Shaver v. Ocean Mining Company*, 21 Cal. 45.

We are not inclined, however, to rest the case upon any doubtful proposition. Granting that the section does not apply as to the signature of Mr. Mariner, we think it would be conceded that upon its face it is ambiguous so far as Mr. Mariner is concerned. The instrument says that the "Northwestern Straw Works" promises to pay. The signature of Mariner is the bare signature of an individual. This is certainly not usual, and should arrest the attention of any one dealing with it at once. People do not ordinarily sign contracts purporting on their face to be contracts of others. If they do, the fact itself suggests at once a doubt as to what they mean by it. In other words, the instrument becomes, as to such signatures, ambiguous. The Negotiable Instrument Law, before referred to, contains several provisions with reference to the construction of negotiable instruments bearing the signatures of persons who have not made their intentions clear, and these must be considered. Subdivision 6, § 1675-17,<sup>3</sup> p. 693, provides that, "where a signature is so placed on an instrument that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an indorser." This provision, by its very terms, applies only to a case of doubt arising out of the location of the signature upon the instrument. Names are sometimes placed at the side, on the end, or across the face of the instrument, and thus a doubt arises as to whether the signer intended to be bound as a maker or an indorser, or perhaps as a guarantor, and to solve these doubts the section in question was evidently framed. It was to settle a doubt fairly arising from the ambiguous location of the name, and applies to no other. In the present case there is no doubt of this nature. The signature of Mr. Mariner is placed in the usual and proper, in fact the only proper, place for a maker. The doubt arising is not a doubt whether he intended to sign as maker, indorser, or guarantor, for it is clear from the location of the name that he did not intend to sign as indorser or guarantor, but simply a doubt whether he intended to sign in an individual or in a representative capacity as maker. To say that, where it conclusively appears from the instrument that the signer intended to sign as a maker, the statute is intended to make him an indorser, would be little short of ridiculous. The statute was passed to meet a case where it is doubtful from the instrument whether a man intended to become an indorser, not to make an indorser out of a person who, without doubt, intended to sign as maker, either individually or as representative of another. We have no doubt, therefore, that this section has no application to the present case.

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<sup>3</sup> N. Y., § 36, subd. 6. — C.

Sections 1677-3 and 1677-4, p. 712, are also referred to as having some bearing on the question. Section 1677-3<sup>4</sup> provides that "a person placing his signature upon an instrument otherwise than as maker, drawer or acceptor, is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity." Section 1677-4<sup>5</sup> provides that, "where a person not otherwise a party to an instrument places thereon his signature in blank before delivery, he is liable as an indorser in accordance with the following rules," etc. As to the last-named section, it is manifest that it has no application, because Mr. Mariner did not place his signature upon the note in blank. The first-named section is equally inapplicable, because it is certain, from the instrument itself, that he placed his signature thereon as maker, either individually or in a representative capacity; hence the contingency named in the section has not arisen. It seems entirely clear from the language of these two sections, and from the notes thereto, that they were intended to lay down in statutory form the propositions already decided by this court in *Cady v. Shepard*, 12 Wis. \*639, and *King v. Ritchie*, 18 Wis. \*554, and other cases following them. There are no other sections of the Negotiable Instrument Law which can be reasonably claimed to have any material bearing on the question now under consideration, and it must therefore be determined upon general principles of the common law.

It is elementary that, in case a written contract is ambiguous in its terms, parol proof of the facts and circumstances under which it was executed may be introduced to aid in its construction. This rule applies to commercial paper, even in the hands of third persons, because, where the ambiguity is apparent to a reasonably prudent man on the face of the paper, he is necessarily put upon inquiry. *Meachem on Agency*, § 443; *Hood v. Hallenbeck*, 7 Hun, 362; 10 Cyc. p. 1051; 4 *Thompson on Corporations*, § 5141. The parol evidence in the present case showed without dispute that Mr. Mariner's signature was attached simply in his representative capacity and as agent of the corporation. There being a plain ambiguity in this respect appearing on the face of the note, the evidence was properly received, and the judgment against Mariner individually was erroneously rendered.

Judgment reversed, and action remanded, with directions to dismiss the complaint.

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<sup>4</sup> N. Y., § 113. — C.

<sup>5</sup> N. Y., § 114. — C.

§ 39 SOUHEGAN NATIONAL BANK *v.* BOARDMAN.

46 MINNESOTA, 293. — 1891.

ACTION against defendant as indorser upon the following promissory note:

\$1,000.

MINNEAPOLIS, *May* 12, 1884.

Six months after date we promise to pay to the order of A. J. Boardman, treasurer, one thousand dollars, value received, with interest at eight per cent. after maturity.

MINNEAPOLIS ENGINE AND MACHINE WORKS.

By A. L. CROCKER, *Sec'y.*(Indorsed) A. J. BOARDMAN, *Treasurer.*

Defendant was treasurer of the Minneapolis Engine & Machine Works, and claims to have made the indorsement in that capacity. Judgment for plaintiff.

MITCHELL, J. (after stating the facts, and deciding that the trial court erred in not submitting to the jury a question as to the extension of the time of payment without the consent of the defendant). With a view to another trial it is necessary to consider the questions involved in the first defense. These are (1) whether, on the face of the paper, this is the indorsement of the corporation or of defendant individually; and (2) whether its character is conclusively determined by the terms of the instrument itself, or whether extrinsic evidence is admissible to show in what character — officially or individually — the defendant made the indorsement.

Where both the names of a corporation and of an officer or agent of it appear upon a bill or note, it is often a perplexing question to determine whether it is in legal effect the contract of the corporation, or the individual contract of the officer or agent. It is very desirable that the rules of interpretation of commercial paper should be definite and certain; and if the courts of the highest authority on the subject had laid down any exact and definite rules of construction for such cases, we would, for the sake of uniformity, be glad to adopt them. But, unfortunately, not only do different courts differ with each other, but we are not aware of any court whose decisions furnish any definite rule or system of rules applicable to such cases. Each case seems to have been decided with reference to its own facts. If what the courts sometimes call "corporate marks" greatly predominate on the face of the paper, they hold it to be the contract of the corporation, and that extrinsic evidence is inadmissible to show that it was the individual contract of the officer or agent. If these marks are less strong, they hold it *prima facie* the individual contract of the officer or agent, but that extrinsic evidence is admissible to show that he executed it in his official capacity in behalf of the corporation; while in still other cases they hold that it is the personal contract of the party who signed it, that the terms "agent," "secretary," and the like, are

merely descriptive of the person, and that extrinsic evidence is not admissible to show the contrary. See *Daniel*, Neg. Inst. § 398, *et seq.* When others have thus failed we can hardly hope to succeed. Perhaps the difficulty is inherent in the nature of the subject.

This court has in a line of decisions held that where a party signs a contract, affixing to his signature the term "agent," "trustee," or the like, it is *prima facie* his individual contract, the term affixed being presumptively merely descriptive of his person, but that extrinsic evidence is admissible to show that the words were understood as determining the character in which he contracted. See *Pratt v. Beaupre*, 13 Minn. 177; *Bingham v. Stewart*, 13 Minn. 96, and 14 Minn. 153; *Deering v. Thom*, 29 Minn. 120; *Rowell v. Oleson*, 32 Minn. 288; *Peterson v. Homan*, 44 Minn. 166; *Brunswick-Balke Co. v. Boutell*, 45 Minn. 21. Only one of these, however, (*Bingham v. Stewart*), was a case of commercial paper where the name of a corporation appeared on its face, and in that case possibly the court did not give due weight to all the "corporate marks" upon it. Where there is nothing on the face of the instrument to indicate in what capacity a party executed it except his signature with the word "agent," "treasurer," or the like suffixed, there can be no doubt of the correctness of the proposition that it is at least *prima facie* his individual contract, and the suffix merely a description of his person. But bills, notes, acceptances, and indorsements are to some extent peculiar — at least, the different relations of the parties, respectively, to the paper are circumstances which in themselves throw light upon, and in some cases control, its interpretation, regardless of the particular form of the signature. For example, if a draft were drawn on a corporation by name, and accepted by its duly authorized agent or officer in his individual name, adding his official designation, the acceptance would be deemed that of the corporation, for only the drawee can accept a bill; while, on the other hand, if drawn on the drawee as an individual, he could not by words of official description in his acceptance make it the acceptance of some one else. So if a note was made payable to a corporation by its corporate name, and is indorsed by its authorized official, it would be deemed the indorsement of the corporation; for it is only the payee who can be first indorser, and transfer the title to the paper. But this is not such a case. It does not appear on the face of this note what the defendant was treasurer of. Extrinsic evidence has to be resorted to at the very threshold of the case to prove that fact.

Counsel for the defendant relies very largely upon the case of *Falk v. Moebbs*, 127 U. S. 597, which comes nearer sustaining his contention than any other case to which we have been referred. But that case differs from this in the very important particular that it appeared upon the face of the paper itself that the payee and indorser was the secretary and treasurer of the corporation, and that as such he him-

self executed the note in its behalf. The case was also decided largely upon the authority of *Hitchcock v. Buchanan*, 105 U. S. 416, which is also clearly distinguishable from the present case, for there the bill sued on purported on its face to be drawn at the office of the company, and directed the drawee to charge the amount to the account of the company, of which the signers described themselves as president and secretary.

Our conclusion is that there is nothing upon the face of the note sued on to take it out from under the rule laid down in the decisions of this court already referred to, that upon its face this is *prima facie* the indorsement of defendant individually, but that extrinsic evidence is admissible to show that he made the indorsement only in his official capacity as the indorsement of the corporation.

Order reversed.\*

### § 39 MCKEEHAN, THE NEGOTIABLE INSTRUMENTS LAW.

[41 AM. LAW REG., N. S., pp. 462-465.]

PROFESSOR AMES criticises this section [N. Y., § 39] as follows:

"Section 20 provides that a person who purports to sign an instrument in behalf of a named principal is not liable on the instrument, if he was duly authorized by the principal. By necessary implication he is liable on the instrument if not duly authorized.<sup>7</sup> This is a departure from the English act and from the almost uniform current of judicial decisions. This new rule involves a flat contradiction of the instrument, and the fiction works not justice, but injustice."

The section is copied from Article 95 of the German Exchange Law, and undoubtedly is a departure from the English act, under which the pretended agent is liable, not on the instrument, but for the damage resulting from the breach of his implied warranty of authority to sign for the principal. Mr. Crawford's original draft embodied the

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\* There is a clear distinction between makers, drawers, and acceptors, on the one hand, and indorsers on the other. An indorsement being necessary to transfer title a payee designated as "A. B. agent" may indorse in that form without becoming liable as indorser. *Huffcut on Agency*, § 194; *Babcock v. Beman*, 1 E. D. Smith (N. Y.) 593; *Vater v. Lewis*, 36 Ind. 288; *First Nat. Bk. v. Hall*, 44 N. Y. 395; *Falk v. Moebs*, 127 U. S. 597. See especially the statement in *Collins v. Buckeye, etc., Co.*, 17 Oh. St. 215. The rule is especially liberal in favor of cashiers who indorse instruments drawn to their order, as, "pay to the order of A. B. cashier." *Bank of Genesee v. Patchin Bank*, 19 N. Y. 312; *Folger v. Chase*, 18 Pick. (Mass.) 63. *Neg. Inst. L.*, § 72, *post*, which extends the liberal rule to a "cashier, or other fiscal officer of a bank or corporation." — H. [See *Johnson v. Buffalo Center St. Bk.*, 134 Iowa, 731, *post*. — C.]

<sup>7</sup> "Mr. Crawford so interprets the section. Crawford's *An. N. I. L.* 26."

English rule,<sup>8</sup> but the commissioners changed it and adopted the German rule deliberately and after mature consideration. It is scarcely true that in doing so they departed from "the almost uniform current of judicial decisions." There is a strong conflict of authority on the point, some states holding the pretended agent liable on the instrument itself, while a somewhat larger number hold him liable only for the damage resulting from the breach of his implied warranty of authority.<sup>9</sup> The latter decisions seem correct on theory. As was said in *Hall v. Crandall*, if the instrument contains language which does not in legal effect charge the pretended agent, "or, in other words, contains language which, in legal effect, binds the principal only, the agent cannot be sued on the instrument itself, for the obvious reason that the contract is not his." He has falsely represented that he had authority to bind another, but he has not intended or attempted to bind himself, and courts which hold him liable on the contract itself "treat all matter which the contract contains in relation to the principal as surplusage, which is, in effect, to make a new contract for the parties concerned instead of construing the one which they made for themselves."<sup>11</sup>

Judge Brewster's answer is: "One signing a note as agent for another should know and be able to show his authority. If he signs without authority, he alone in fact, and so in law, is the maker of the note, and he should be held liable accordingly." This view, though perhaps difficult to justify on the principles of contract, is supported by weighty authority,<sup>2</sup> and important practical advantages. The rule

<sup>8</sup> Crawford, An. N. I. L. 26.

<sup>9</sup> In the following states the pretended agent appears to be held liable on the contract itself: *Ormsby v. Kendall*, 2 Ark. 338 (but see *Dale v. Donaldson*, 48 Ark. 190); *Richie v. Bass*, 15 La. Ann. 668; *Terwilliger v. Murphy*, 104 Ind. 32; *Keener v. Harrod*, 2 Md. 63; *Byas v. Doores*, 20 Mo. 284; *Weare v. Gove*, 44 N. H. 196; *Clarke v. Foster*, 8 Vt. 98.

In the following states, the pretended agent is held liable not on the contract itself, but for the damage resulting from the breach of his implied warranty of authority: *Hall v. Crandall*, 29 Cal. 567; *Johnson v. Smith*, 21 Conn. 627; *Duncan v. Niles*, 32 Ill. 532 (but see *Frankland v. Johnson*, 147 Ill. 520); *Bartlett v. Tucker*, 104 Mass. 336; *Noyes v. Loring*, 55 Me. 408; *Sheffield v. Ladue*, 16 Minn. 388; *White v. Madison*, 26 N. Y. 117; *Bryson v. Lucas*, 84 N. C. 680; *Hopkins v. Mehaffy*, 11 S. & R. (Pa.) 126.

<sup>11</sup> *Hall v. Crandall*, *supra*. Referring to the cases which hold the pretended agent liable on the instrument, WALTON, J., said in *Noyes v. Loring*, 55 Me. 408: "The inconsistency of such a doctrine, to use no stronger term, will be apparent by supposing that instead of a promise to pay money the pretended agent had signed a promise that his principal should marry the plaintiff within a given time, or do some other act which it was perfectly competent for the principal to perform, but which the agent could not. What would be thought of a declaration charging the pretended agent as a principal in such a case?"

<sup>2</sup> To the decisions referred to above, and the very high authority of the German Code, there may be added the opinion of Mr. Arthur Cohen, Q. C.



will tend to increase negotiability, by assuring the holder that if the pretended principal cannot be reached because of a lack of authority in the agent, a recovery may be had on the instrument itself against the agent. Then there is the additional advantage — which on reflection will appear to be of great importance — that the liability of the agent can be easily proved and the amount to be recovered ascertained by a mere inspection of the instrument, whereas if the only recovery were for damages resulting from a breach of warranty, a complicated set of disputed facts would often go to the jury, from which it would be difficult even to approximate the damage. The case which Professor Ames supposes, as proving the injustice of section 20 may serve as an illustration of this. He says, "For example, A., mistakenly believing that he is duly authorized, signs a note, 'A., agent for B.,' and delivers it to C., the payee. At maturity B. repudiates the note. He is, however, at that time a bankrupt. A. is rightfully chargeable to C. on his implied warranty of authority, but only to the amount that C. might have recovered from B., if he had authorized the note. But under section 20 A. is liable to C. for the face of the note." But, as Mr. Cohen points out, "It would be doubtful what could be recovered until the dividend was declared and the bankruptcy concluded; and in the case of the principal not being bankrupt, but being a man in bad credit, the question would have to be left to a jury what amount could probably be recovered from the principal. It may well be held that in actions on negotiable instruments against a person who professedly acts on behalf of another person, A., it would be inconvenient to allow the former to attempt to prove that probably the whole amount could not be recovered from A."

So the case stands about as follows: The rule discarded by the Commissioners works out the rights of the parties strictly on the rules of contract, and the balance of authority is in its favor. Under it, however, a plaintiff may encounter considerable difficulty and uncertainty in proving his case. The rule they have embodied in the act — while perhaps less clear on theory — is supported by the authority of several states, by the German Code, by some of the best expert opinion of England, and (besides tending to increase negotiability) enables

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(one of the framers of the English act, and admittedly one of the leading experts in England on this subject), who regards section 20 as an improvement on the English act. He says: "This section certainly alters the law as it exists in England, but I think it very likely that the alteration is an improvement. The wisdom of the rule laid down in *Cohen v. Wright* has often been doubted. . . . I think the 20th section should be retained, and may be considered as a practical improvement of the law, unless there be reason to suppose that merchants and bankers think it unjust. I agree with Mr. Brewster that much indulgence should not be shown in business to a person who professes to have authority when he is really acting without authority." Letter from Mr. Cohen to Judge Brewster, written March 31, 1901.

a plaintiff to know and prove, with ease and certainty, the amount to be recovered. Of course, under such circumstances, individual opinion will differ somewhat as to which rule should have been chosen.<sup>3</sup>

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§ 40 STAGG v. ELLIOTT, 12 Common Bench, N. S. 373. — 1862. Bill accepted “per pro. William Elliott, George Elliott.” George was the son of the defendant, William, and manager of his business. BYLES, J. — The words “per procuration” are an express statement that the party accepting the bill has only a special and limited authority, and therefore a person who takes a bill so accepted is bound at his peril to enquire into the extent and nature of the agent’s authority. It is not enough to show that other bills similarly accepted or endorsed have been paid, although such evidence, if the acceptance were general by an agent in the name of a principal, would be evidence of a general authority to accept in the name of the principal. \* \* \* The result of the decisions seems to be this, that the way in which this bill was accepted is the legitimate way of showing the fact that the acceptor has only a special and limited authority. Further, it is to be observed, that this rule depends upon the law merchant, which extends over Europe and America; and this is the way in which it is understood all over the world.

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§ 40 THE FLOYD ACCEPTANCES, 7 Wallace (U. S.), 666. — 1868. MR. JUSTICE MILLER. — An individual may, instead of signing, with his own hand, the notes and bills which he issues or accepts, appoint an agent to do these things for him. And this appointment may be a general power to draw or accept in all cases as fully as the principal could; or it may be a limited authority to draw or accept under given circumstances, defined in the instrument which confers the power. But, in each case, the person dealing with the agent, knowing that he acts only by virtue of a delegated power, must, at his peril, see that the paper on which he relies comes within the power under which the agent acts. And this applies to every person who takes the paper afterwards; for it is to be kept in mind that the protection which commercial usage throws around negotiable paper, cannot be used to establish the authority by which it was originally issued. These principles are well established in regard to the transaction of individuals. They are equally applicable to those of the government. Whenever negotiable paper is found in the market purporting to bind

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<sup>3</sup> See also article in 10 Law Notes, 104, entitled “Liability of an agent under the Negotiable Instruments Law,” and criticism of this article in 20 Harv. Law Rev. 159. — C.

the government, it must necessarily be by the signature of an officer of the government, and the purchaser of such paper, whether the first holder or another, must, at his peril, see that the officer had authority to bind the government.

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§ 40 *NIXON v. PALMER*, 8 New York, 398. — 1853. Bill accepted “Jeremiah G. Palmer, by James L. Palmer.” Defense, want of authority. *MASON, J.* — “The bill being on its face accepted by James L. Palmer for the defendant, was notice that he professed to act under an authority, and imposed upon the plaintiffs the duty of ascertaining that he acted within it.”

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## **XII. Indorsement by infant or corporation.**

§ 41 *FRAZIER v. MASSEY*.

14 INDIANA, 382. — 1860.

*WORDEN, J.* — Action by Massey against the appellants upon a promissory note made by the latter to William T. Hess, and by Hess indorsed to the plaintiff.

Answer that said William T. Hess, the payee of the note, was, at the time he indorsed it to the plaintiff, a minor under the age of twenty-one years; wherefore, etc.

To this answer a demurrer was sustained, and the plaintiff had judgment.

The ruling on the demurrer raises the only question involved in the case.

We think it clear that the demurrer was correctly sustained to the answer. The disability of an infant to make a valid, binding contract, is a personal privilege intended for the benefit of the infant himself, and none but he, or his representatives, can take advantage of such disability. (1 Pars. Cont. 275.) Besides this, the defendants, by making the note to Hess, asserted to the world his competency to negotiate and assign the paper, and they cannot be permitted to gair-say the assertion so made.<sup>4</sup> (Edw. on Bills, p. 250; Story on Prom. Notes, § 80, 5th ed.)

*PER CURIAM.* — The judgment is affirmed with 6 per cent. damages and costs.

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<sup>4</sup> See Neg. Inst. L., § 110. A second indorser cannot deny the competency of the first indorser. *Prescott Bank v. Caverly*, 7 Gray (Mass.) 271. — H.

## § 41

WILLARD *v.* CROOK.

21 APPEAL CASES (DIST. OF COL.) 237. — 1903.

APPEAL by plaintiff from an order of the Supreme Court overruling his motion for judgment against the defendants for want of sufficient affidavits of defense, in an action on a promissory note against the maker and several indorsers.

The affidavit of defense of the last indorser was that the preceding indorser, a corporation, had indorsed the note solely for accommodation.

Mr. Justice SHEPARD delivered the opinion of the court:

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The defense of Walter P. Wilkins, the last indorser of the note, is equally without merit. Whether the preceding indorser, Wilkins & Company, incorporated, had the power to make an accommodation indorsement merely is a question of no importance so far as his liability under the subsequent indorsement is concerned. If it were conceded that the corporation's indorsement of the paper was beyond its powers, and it incurred no liability thereby, its effect was, nevertheless, to pass the property therein. Code, D. C., § 1326.<sup>5</sup> And the subsequent indorsement by Wilkins to Willard was a warranty of the genuineness of the paper, of his own title thereto, and of the capacity of all the preceding parties to contract. *Idem*, §§ 1369, 1370.<sup>6</sup> \* \* \*

For the reasons given, the order will be reversed with costs, and the cause remanded for further proceedings in conformity with this opinion. It is so ordered.<sup>7</sup>

## XIII. Forged signatures.

## § 42

LANCASTER *v.* BALTZELL.

7 GILL &amp; JOHNSON (MD.) 468. — 1836.

ACTION by indorsee against maker. Judgment for plaintiff. Defendant appeals. The facts appear in the opinion.

<sup>5</sup> N. Y., § 41. — C.

<sup>6</sup> N. Y., §§ 115, 116. — C.

<sup>7</sup> In *Brown v. Donnell*, 49 Me. 421, the court held that in an action by the indorsee of a note against the maker, the plaintiff is only required to prove an indorsement sufficient to pass the property in the note. "The authority to be proved is not one to bind the corporation by a contract of indorsement, but simply an authority to transfer the property of the company. . . . If the indorsement is sufficient to pass the property, so as to protect the maker in paying the note, that is all that is necessary to render him liable to the indorsee." P. 425.

See also *Oppenheim v. Simon Reigel Cigar Co.*, 90 N. Y. Supp. 355, *post*, p. —; *Winer v. Bank of Blytheville*, 89 Ark. 435, and cases, *post*, under Neg. Inst. Law, §§ 110–112, 115, 116. — C.

BUCHANAN, CH. J., delivered the opinion of the court. A bill or note payable to order can only be transferred by indorsement; and as an action against the acceptor or drawer can only be sustained by one who has legal title, which cannot be derived through the medium of forgery, it is incumbent on the plaintiff in such an action to show his interest in the bill or note, which must be done by proving that it was indorsed by the person to whom, or to whose order, it is made payable.

This is an action by the second indorsee against the maker of a promissory note, payable to the payee or order, which was resisted at the trial on the ground, that the first indorsement, purporting to be by the payee was a forgery, of which proof was offered by the defendant. On the part of the plaintiffs, it was proved, that the defendant on being called on by their counsel, after the indorsement to them, to pay the note, examined it, and said it was right, and he would settle it with them. Upon which the court instructed the jury that if they believed the defendant, when the note was presented to him by the counsel of the plaintiffs, had examined the indorsements and said it was right, the plaintiffs were entitled to recover, although they might believe the indorsement of the payee's name had been forged, and notwithstanding that acknowledgment had been made, after the transfer of the note by these indorsements to them; on an exception to which instruction the case is brought up.

Apart from the alleged conversation between the defendant and the counsel of the plaintiffs, it is very clear that the plaintiffs are not entitled to recover, if the first indorsement in the name of the payee of the note was forged; as the title was not and could not thereby be transferred, but continued in the payee, who on obtaining possession of the note, might sue upon it, and recover against the maker, notwithstanding he should have paid it to him, into whose hands it came, through the medium of forgery; for besides that in such case the payee has not parted with his title, the payee of a note whose name is forged knows nothing of it, and the maker before he pays it to the holder as indorsee should look carefully to the indorsements. And if one is to suffer, the loss should fall on him who is most in fault, or most negligent.

The only question then, in this case is, whether, if after the indorsements had been made, the defendant, on the note being presented to him by the counsel of the plaintiffs, examined the indorsements and said it was right, that makes any difference. And we think it does not. By saying so, he gave no credit to the note; and did not thereby induce the plaintiffs to take it. That had been done before, and not on the faith of what he said. The plaintiffs might before they took the note have inquired whether the first indorsement was by the payee or not, and not having done so, they must abide by the consequence and cannot throw the loss upon the defendant, who had done nothing to

mislead them or induce them to take the note; and who if made to pay the amount in this action, may be made to pay it over again by the payee, whose right remains unimpaired.

It is not like the case of a drawee of a bill, who if on being asked if the acceptance is in his handwriting, says that it is and that it will be duly paid, cannot afterwards set up as a defense the forgery of his name; because by saying so he has accredited the bill and induced another to take it, which being his own fault the loss ought to fall on him, and not on another, who has been induced to take the bill on the faith of his assurance.<sup>8</sup>

Judgment reversed.<sup>9</sup>

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§ 42 WELLINGTON v. JACKSON, 121 Massachusetts, 157.—(1876). GRAY, C. J.—“Although the signature of Edward H. Jackson was forged, yet if, knowing all the circumstances as to that signature, and intending to be bound by it, he acknowledged the signature and thus assumed the note as his own, it would bind him, just as if it had been originally signed by his authority, even if it did not amount to an estoppel *in pais*. (*Greenfield Bank v. Crafts*, 4 Allen, 447; *Bartlett v. Tucker*, 104 Mass. 336, 341.)”<sup>1</sup>

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<sup>8</sup> Nor like the case of a drawee who accepts or pays a bill upon which the drawer's name is forged. See *National Park Bk. v. Ninth Nat. Bk.*, 46 N. Y. 77.—H. [See *First Nat. Bank v. Bank of Wyndmere*, 15 N. D. 299, *post*, and *State Bank of Chicago v. First Nat. Bank of Omaha*, 127 N. W. (Neb.) 244, *post*.—C.]

<sup>9</sup> Money paid to a holder deriving title through a forged indorsement may be recovered back. *Chambers v. Union Bank*, 78 Pa. St. 205; *Espy v. Cincinnati Bank*, 18 Wall. (U. S.) 604; *Holt v. Ross*, 54 N. Y. 472; *Green v. Purcell N. B.* (Ind. Ter.), 37 S. W. Rep. 50. Contra: *London, etc., Bank v. Bank of Liverpool* (1896), 1 Q. B. D. 7.—H.

[In *First Nat. Bk. v. Shaw*, 149 Mich. 362, it was held that makers who actually signed a joint and several note purporting at the time of its delivery to have been signed by twenty persons and bearing nothing on its face to cast doubt upon any of the signatures, cannot escape liability to a *bona fide* holder upon the ground that the names of some of the purported makers were forged before the note was executed and delivered. See this case reported with notes in 13 L. N. S. 426, and 12 A. & E. Ann. Cas. 437.—C.]

<sup>1</sup> Accord: *Howard v. Duncan*, 3 Lansing (N. Y.) 174; *Hefner v. Vandolah*, 62 Ill. 483. But non-repudiation is not conclusive evidence of ratification. *Traders' N. B. v. Rogers*, 167 Mass. 315. Contra: *Brook v. Hook*, L. R. 6 Ex. 89; *Workman v. Wright*, 33 Oh. St. 405; *Henry v. Heeb*, 114 Ind. 275; *Henry Christian, etc., Association v. Walton*, 181 Pa. St. 201; *Owsley v. Philips*, 78 Ky. 517.

While there is a sharp conflict of authority as to the possibility of ratifying a forgery, all of the cases agree that one may by his admissions or conduct estop himself from denying the genuineness of his signature as against one who has changed his legal position relying on such admissions, representations, or conduct. Hufcut on Agency, § 43; cases *supra*; *Lancaster v. Baltzell*, *ante*, p. 221.—H.

## § 42

WARREN *v.* SMITH.

100 PACIFIC REPORTER (UTAH) 1069. — 1909.

THE Southern Pacific Company in March, 1904, delivered to plaintiff, for services rendered, its pay check payable to his order, and drawn on the treasurer of the Southern Pacific Company. This action is to recover from defendant the money which he collected on said check. Judgment for defendant and plaintiff appeals.

STRAUP, C. J. \* \* \* The court found the facts as follows: That the check was delivered to the plaintiff on March 23d [1904] at Montello; that it was stolen from him on March 25th; that the plaintiff had not indorsed the check, nor had he authorized anybody to do so; that the plaintiff had received no part of the money evidenced by it; that the defendant "became indorsee and indorser of said check on or about the 1st day of April, 1904, at Ogden City, Utah; that said check, indorsed with the name of the payee, was transferred and delivered to said defendant on or about April 1, 1904, by the holder, without any notice of any infirmity, and on the same day the said defendant indorsed the said check to the Commercial National Bank of Ogden, who thereupon indorsed it to the Bank of California, at San Francisco, Cal., which said last-named bank on April 4, 1904, presented said check to the drawee, who paid it and took possession of it, and thereafter, to wit, in the spring of 1905, returned it to the plaintiff herein, who thereupon learned for the first time that it had been paid by the drawee, and who immediately intrusted an agent of the said Southern Pacific Company with the collection thereof; that the plaintiff failed to present the check to the Southern Pacific Company for payment, and failed to demand payment of it or from any indorser thereon; that neither the defendant nor any subsequent indorser thereon had knowledge or notice of any defect in the check for more than one year and seven months after the check had been cashed by the defendant. As conclusions of law the court found that the plaintiff delayed an unreasonable time and was negligent in failing to notify the defendant of the forged indorsement, and that the plaintiff was not entitled to recover. Judgment was accordingly entered for the defendant; from which the plaintiff has appealed.

He contends that the court erred in its findings and conclusions and in entering judgment for the defendant upon the facts found. We think the judgment is wrong. It is contrary to the findings and to the evidence. It is shown beyond dispute that the check is payable to the order of the plaintiff, that it was stolen from him, and that the indorsement of his name thereon was a forgery. The court so found. Under those conditions the check came into the hands of the defendant, who admitted in his answer that he "collected thereon the sum of \$63.20," the amount of the check. While the findings show that the check was

delivered to the defendant without notice of any infirmity, yet there is no evidence to support it, and neither the evidence nor the findings show that he paid a valuable consideration for the check. The law generally is to the effect that, "although the robber or finder of a negotiable instrument can acquire no title against the real owner, still if it be indorsed in blank, or payable or indorsed to bearer, a third party acquiring it from a robber or finder *bona fide* for a valuable consideration, and before maturity without notice of the loss, may retain it against the true owner. \* \* \* But under a forged indorsement even a *bona fide* holder without notice acquires no title." Daniels on Neg. Insts. (5th ed.), § 1469. Where the negotiable instruments are stolen, the owner may pursue them and the proceeds of them, until they reach the hands of a *bona fide* holder for value before maturity. In like manner an action of trover lies without previous demand and refusal against one who possesses himself improperly of the bill stolen from the plaintiff, or against one who receives payment even in good faith of such stolen bill under a forged indorsement. 3 Randolph, Comm. Paper (2d ed.), §§ 1682, 1683. Furthermore, though proof had been made that the defendant purchased the check for value and without notice in due course, still, as shown by the authorities above cited, he acquired no right or title under the forged indorsement of the plaintiff's name. The general rules applicable to *bona fide* holders for value do not apply in such a case. To the same effect also is our statute. Section 1575,<sup>2</sup> Comp. Laws 1907.

The judgment of the court below is therefore reversed, and the cause remanded for a new trial. Costs to appellant.

FRICK and McCARTY, JJ., concur.<sup>3</sup>

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## § 42 HOFFMAN v. AMERICAN EXCHANGE NATIONAL BANK.

2 NEBRASKA (UNOFFICIAL) 217. — 1901.

HASTINGS, C. The question in this case is whether or not the defendant bank is liable to plaintiff for the amount of a draft to his order, procured at Elizabethtown, Pa., and indorsed to the order of Peter W. Brubaker, and sent by plaintiff to an imposter at Lincoln, Neb., who claimed to be Brubaker, and which was cashed for the imposter by the defendant bank. The plaintiff was acting as disbursing agent for the executor of an estate, from which one Peter W. Brubaker was entitled to receive \$264.15. The plaintiff had made con-

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<sup>2</sup> N. Y., § 42. — C.

<sup>3</sup> See article in 19 Bench and Bar, 63, entitled "Conversion of checks negotiated on forged indorsements." — C.



siderable exertions to find Brubaker for the purpose of making this payment, but had failed to do so. Plaintiff had made to Brubaker two previous payments from the estate — one paid by a draft sent to Illinois and receipted for by him, and one payment made to him in person at Elizabethtown, Pa., where plaintiff resides. With reference to this third and final payment plaintiff had written to Omaha and to Illinois, and received no response. He finally received a letter dated July 2, 1895, saying: "Lincoln, Nebr., July 2, 1895. Mr. C. S. Hoffman: I got a letter from my brother sader you wanted my address it is Peter W. Brubaker, Lincoln, Nebr." To this plaintiff replied as follows: "Elizabethtown, July 5, 1895. Mr. Peter W. Brubaker: This afternoon I received your letter. I have been writing around to the different places where you were before, but the letters came back. You will take the release before a notary public, sign and acknowledge and have some person to sign as witness, and then return it to me, and I will send you draft for your share, less expenses. Yours truly, C. S. Hoffman."

The release was executed evidently to plaintiff's satisfaction, for on July 12th he sent the following letter: "Elizabethtown, July 12, 1895. Mr. Peter W. Brubaker, Lincoln, Neb. Your release to Jacob Risser executor of the will of Peter Oberholtzer, dec'd, came back all right. Inclosed you find draft No. 5774 for \$264.15, which with \$1.75 for the expense of release and draft is in full of your share in the final distribution of the estate. Please let me hear from you when you get this so that I know that all is right. Yours truly, C. S. Hoffman."

The draft mentioned was cashed by the defendant bank; the recipient being identified as Peter W. Brubaker by the notary, Walter A. Leese, of Lincoln, before whom the release had been executed, and in whose care the final letter and draft were sent by the plaintiff. The evidence, however, shows conclusively that the Peter W. Brubaker who was entitled to this money was not in Lincoln at that time, but in Indiana. He says he received no money. Plaintiff had been called upon to pay it again. The draft cashed by the defendant bank was never indorsed by the Peter W. Brubaker who was entitled to a share in the estate of which Hoffman was disbursing agent. The draft was, by the defendant, transmitted to a New York correspondent, and collected through it from the drawer at Elizabethtown, Pa. It was drawn to the order of C. S. Hoffman, by him indorsed payable to the order of Peter W. Brubaker. The District Court found that the above facts did not show any liability on the part of the defendant bank, and rendered judgment accordingly. That judgment we are asked to reverse, as not being sustained by the evidence, and on the ground that the facts shown do constitute a liability against the defendant bank.

The trial court found, first, that the plaintiff intended the draft to be paid to the individual who received the money from defendant, and that defendant was not guilty of any negligence in paying it; second, that the defendant was led and induced to pay the draft by acts of plaintiff, and plaintiff's negligence prompted its payment; and, third, that the plaintiff was not the real party in interest, and could not maintain the action, it appearing that he was simply the agent of Risser, the executor of the estate from which the money came.

The liability of defendant is asserted on the grounds set forth in section 42 of the Negotiable Instruments Act of New York, which has been enacted in effect in fourteen other states, and is claimed to be declaratory of the common law. Said section 42 reads as follows: "Where a signature is forged or made without authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority."

It is claimed that this signature is a forgery, and the defendant therefore liable. As above stated, there seems to be no doubt that the real Peter W. Brubaker who was among the heirs of this estate never indorsed this draft. But it also seems clear that the plaintiff is not entitled to set up this claim. A recent case in Rhode Island (*Tolman v. American National Bank*, 22 R. I. 462) seems to sustain plaintiff's contention. Its syllabus has the following: "A check drawn payable to the order of A. was procured by representations that the person to whom it was given was A., and the indorsement of the latter was forged thereto, and it was paid by the bank. Held, that the bank was liable to the drawer for such sum, both at the common law and under the statute." Rhode Island has adopted the statute above cited. The weight of authority, however, seems to be decidedly in favor of the doctrine that where a check or draft is drawn or indorsed and delivered to a party, to be cashed by him under the name in which it is made out or indorsed, that his signature by way of indorsement in that name is valid as between an innocent holder and the party delivering it to him. This is commonly put on the ground that the payer of the draft or the purchaser of it is simply carrying out innocently the intention of the maker or indorser. *Emporia Nat. Bank v. Shotwell*, 35 Kan. 360; *Meridian Nat. Bank v. First Nat. Bank*, 7 Ind. App. 322; *Robertson v. Coleman*, 141 Mass. 235; *Levy v. Bank of America*, 24 La. Ann. 220; *Land, Etc., Co. v. N. W. Bank*, 196 Pa. 230. It is also placed sometimes, as was done in a measure in this instance, by the trial court, on the ground of negligence on the part of the

maker. It is sometimes held that the payee is a fictitious person, and the check or draft therefore payable to bearer.

It is suggested in defendant's brief that the exemption from liability is more properly placed on the ground of estoppel, or, as it is stated in the Negotiable Instrument Act, that the party is "precluded from setting up the forgery or want of authority." It certainly would seem that in this case when Mr. Hoffman was satisfied with the release he got and mailed the draft to the maker of that release, he asserted as definitely as a man could his desire that this money should be paid where it was paid. After that desire had been acted upon, and the false Brubaker has received the money, it would seem too late for the plaintiff to discover his mistake, and collect the money back from one who had paid it out to the individual he requested, though not the one he thought he was requesting to have it paid to.

It is recommended that the judgment of the district court be affirmed.

DAY and KIRKPATRICK, CC., concur.

Affirmed.

#### ON REHEARING.

ALBERT, C. \* \* \*

The plaintiff insists that the sole question in this case is whether the indorsement of the draft by the imposter was a forgery. We do not believe a determination of that question will dispose of this case. That the indorsement was a forgery may be conceded; but it does not necessarily follow that the plaintiff is entitled to recover in this action. We think the majority of cases, certainly the best-considered cases, hold that, under the circumstances shown in evidence in this case, an innocent purchaser is protected by such indorsement. *Meridian Nat. Bank v. First Nat. Bank*, 7 Ind. App. 332; *Emporia Nat. Bank v. Shotwell*, 35 Kan. 360; *Kohn v. Watkins*, 26 Kan. 691; *Land Title & Trust Co. v. N. W. Nat. Bank*, 196 Pa. 230; *Robertson v. Coleman*, 141 Mass 235; *United States v. Nat. Exchange Bank (C. C.)*, 45 Fed. 163; *Crippen, Lawrence & Co. v. Am. Nat. Bank of Kansas City*, 51 Mo. App. 508; *Forbes v. Espy*, 21 Ohio St. 474.

It has been suggested that the cases just cited may be classified under four heads, the basis of such classification being the ground upon which the courts place their respective decisions, which are as follows: First, that such indorsement effectuates the intention of the drawer; second, that the drawer has been guilty of negligence; third, that the drawer is to be treated as a fictitious person; fourth, estoppel. But such classification is unscientific, and is based on the language of the opinions, rather than upon any principle underlying them. A careful analysis of the cases will show, we think, that the controlling principle in each is that of estoppel, which, to our minds, is peculiarly applicable to cases of this character.

The plaintiff had money which belonged to Peter W. Brubaker. An imposter assumed the name of Peter W. Brubaker, and claimed the money. His identity was a question for the plaintiff. Satisfied that he was dealing with the real Peter W. Brubaker, the plaintiff indorsed and delivered the draft to the imposter. Of the contractual obligation thus created, the delivery of the draft was an essential element, and stamped the impostor as the person to whose order the plaintiff intended payment to be made. In other words, by the delivery of the draft to the imposter the plaintiff held him out to the world as his indorsee, and as the person to whose order he had, by his indorsement, directed payment to be made. He cannot now be heard to complain that the defendant acted on the indicia of identity with which he himself had clothed the imposter.

The plaintiff relies on the case of *Rogers v. Ware*, 2 Neb. 29, wherein it is held that, "if a draft be payable to some person known at the time to exist, as the party to whose order it was to be paid, the genuine indorsement of such payee is necessary in order to a recovery thereon by an indorsee, even though he have no interest in it and the drawer knew that fact." That case would tell in favor of the plaintiff only on the theory that, when he indorsed and transmitted the draft to the imposter, he had in mind, as his indorsee, the real Peter W. Brubaker. But that theory is not supported by the facts. The name the plaintiff had in mind, undoubtedly, was Peter W. Brubaker; but the person whom he had singled out as the person bearing that name, and as the one entitled to the money in his hands, was the imposter. This becomes clear, when we remember that he insisted on a release before transmitting the draft, and transmitted it on receipt of the release. The person he had in mind as his indorsee was the person who executed the release, which was the imposter. The real Peter W. Brubaker, under the circumstances, was not entitled to the draft, because he was not the person who executed the release. His indorsement of the draft would have been a forgery. \* \* \*

It is recommended that the conclusion reached in the former opinion be adhered to, and that the judgment of the District Court be affirmed.

AMES and DUFFIE, CC., concur.

PER CURIAM. The conclusion reached by the commissioners is approved, and, it appearing that the adoption of the recommendation made will result in a right decision of the cause, it is ordered that the conclusion reached in the former opinion be adhered to, and the judgment of the District Court affirmed.

Affirmed.<sup>4</sup>

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<sup>4</sup> See criticism of this case in 3 Col. Law Rev. 580.

See exhaustive note to *Land Title and Trust Co. v. N. W. Nat. Bk.*, 196 Pa. 230, in 50 L. R. A. 75, entitled "Check or bill issued, or indorsed, to imposter — who must bear loss," continued in note to *Harmon v. Old Detroit Nat. Bk.*.

## § 42 MCKEEHAN, THE NEGOTIABLE INSTRUMENTS LAW.

[41 AM. LAW REG., N. S., pp. 502-509.]

AN interesting line of cases is involved in the discussion of this section [§ 42]. Suppose A., falsely representing himself to be B., a citizen of X. town, goes to C. for a loan. C. makes inquiry concerning B., and, finding him to be a prosperous and responsible merchant of X. town, hands A. a check payable to the order of B., whom he supposes that A. is. A. indorses the check in B.'s name and A. or his indorsee has it cashed. The question then comes up between the bank and C. (the drawer) as to who shall bear the loss. This set of facts, with strikingly few variations, has been presented in numerous cases, all of them, prior to the case of *Tolman v. American National Bank*, (22 R. I. 462) holding that C. must bear the loss.<sup>5</sup>

153 Mich. 73, in 17 L. N. S. 514. See also article on "Loss by check delivered to imposter" in Case and Comment for December, 1900, p. 75.

See also *Cent. Nat. Bk. v. Nat. Met. Bk.*, 31 App. Cas. D. C. 391; *Heavey v. Com. Nat. Bk.*, 27 Utah, 222; *Jamieson v. Heim*, 43 Wash. 153; *Heim v. Neubert*, 48 Wash. 587.

It is important to note the distinction "between a case where the imposter assumes to be the person by whose name the payee is described in the check, and a case where he merely assumes to be the agent of such person; it being conceded even by the courts which hold that in the former case the loss must fall upon the drawer, that in the latter case it will fall upon the drawee, at least in the absence of negligence on the part of the drawer." Note in 17 L. N. S. at p. 516, citing *Murphy v. Met. Nat. Bk.*, 191 Mass. 159, and *Houser v. Nat. Bk.*, 27 Pa. Super. Ct. 613. — C.

<sup>5</sup> *U. S. v. Nat. Bank*, 45 Fed. R. 163; *Meyer v. Indiana Bank*, 61 N. E. Rep. 596; *Emporia Bank v. Shotwell*, 35 Kan. 360; *Robertson v. Coleman*, 141 Mass. 231; *First Bank v. American Bank*, 49 N. Y. App. Div. 349; *Merch. Bank v. Metropolitan Bank*, 7 Daly, 137; *Land Title and Trust Co. v. N. W. Bank*, 196 Pa. 230; *Metzger v. Franklin Bank*, 119 Ind. 359.

And see *Meridian Bank v. First Bank*, 7 Ind. App. 322; *Elliott v. Smitherman*, 2 Dev. & B. (N. C.) 338; *Forbes v. Espy*, 21 Oh. St. 474, in which, though the name adopted by the swindler appears to have been really fictitious, the loss is thrown on the drawer for the same reason as that which governed the former cases.

The same rule prevails as to the sale of chattels: *Edmonds v. Merch. Co.*, 135 Mass. 283; *Samuel v. Cheney*, 135 Mass. 278; *Dunbar v. Boston R. R. Co.*, 110 Mass. 26; *Alexander v. Swackhamer*, 105 Ind. 81.

A case interesting (though not quite in point) in connection with the rule here discussed is *Graves v. The American Exchange Bank*, 17 N. Y. 205, which holds that if a check be made payable to one person and another person of precisely the same name or initials, so far as these are written out in the check, comes wrongfully or accidentally into possession of the same, indorses it, and obtains the money on it from the bank, still the bank is liable to make good the amount to the drawer. Possibly this carries the bank's liability to an excessive point. It would seem that the drawer, having represented that any man named John Smith is the payee, should be estopped to deny that the particular John Smith who indorsed the check and had it cashed is the payee.

This result may be reached in several ways, none of which is without difficulty.

1. You may hold that A., albeit he is representing himself by a name falsely assumed for the purpose of deceiving C., is the real payee, the person to whom C. intended that the check should be paid. Under this view, any question as to C.'s negligence becomes immaterial. He must bear the loss, not because he has negligently trusted a stranger, but because the physical person who stood before him and with whom he dealt is the person whom he intended the bank should pay. The difficulty with this view is that although C. intended that the money should be paid to the person standing before him, it is equally true that he intended that it should be paid to B. of X. town.

2. You may hold that the drawer is liable because he has negligently trusted a stranger, but this view is unsatisfactory because none of the cases in point go on this ground, and because the loss is thrown on C., even when he has admittedly exercised all reasonable diligence.

3. You may hold that the payee is fictitious, and that the check is therefore payable to bearer; but such an instrument is payable to bearer only when the drawer knows that the payee is fictitious. Moreover, if B., of X. town, is in existence and known to the drawer, such a view is clearly untenable.

4. You may hold that C. is estopped to deny that A., to whom he gave the check, is the real payee. But estoppel cannot operate unless the fact represented be known to and acted on by the bank, and where the swindler indorses the check to a *bona fide* holder who cashes it (and this is what happened in most of the cases) the bank knows nothing of the delivery to A. and does not rely on the drawer's representation that he is the payee.<sup>6</sup>

As a matter of fact, the courts base their decision on the first ground, namely, that the bank has merely carried out the drawer's intent. Here and there an expression may be singled out which seems to countenance one or more of the other views, but a fair reading of the opinions shows that one idea dominates nearly all of them, namely, that the money has been paid to the person for whom it was really intended. The reasoning is briefly this: A man's name is the verbal designation by which he is known, but the man's visible presence

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<sup>6</sup> However, in an interesting note to *Land Title and Trust Co. v. Bank*, 50 L. R. A. 83, the above objection to the estoppel theory is claimed to be invalid, the argument being: When the bank pays a check upon a forged indorsement it acts on the belief that the person who indorsed it was the person whom the drawer intended to designate as payee. This belief is largely — and when the person who presents the check is not identified — is solely induced by the fact that the check is, or was at the time of indorsement, in the imposter's possession. The drawer — by delivering the check to the imposter in the belief that he is the person named as payee — creates the appearance on which the bank acts.

affords a surer means of identification. C. was deceived as to the man he was dealing with, but he dealt with and intended to deal with the visible man who stood before him, identified by sight and hearing. Thinking that this man's name was B., he drew the check to B.'s order intending thereby to designate the person standing before him; so the bank has simply paid the money to the person for whom it was intended.

Such was undoubtedly the law prior to the act. By section 23 [N. Y., § 42], when a signature is forged or made without the authority of the person whose signature it purports to be, it is wholly inoperative except as against the person who "is precluded from setting up the forgery or want of authority." In the light of the cases above referred to, the meaning of this section, as applied to the point under discussion, seems reasonably clear. The drawer (C.) "is precluded from setting up the forgery or want of authority" and so the signature is not inoperative as to him and the law remains unchanged.

In 1899, Rhode Island adopted the Negotiable Instruments Law and in 1901 the case of *Tolman v. American National Bank* arose in that state.

In that case, one Louis Potter, representing himself to be Earnest A. Haskell, went to the plaintiff, (Tolman) for a loan of money, giving the occupation and residence of Haskell as his own. The plaintiff made inquiry, and finding that Haskell was employed and was living as represented, gave Potter his check on the defendant bank payable to the order of Haskell. Potter indorsed Haskell's name and delivered the check to one A. R. Hines, who had it cashed at the bank. In an action by Tolman to compel the bank to credit him with the amount of the check, the court held that the bank must bear the loss.

As Professor Ames remarks, "the decision is a surprising one, both from the standpoint of common law principles, and of Section 23 of the act. All the reported cases on the point of fraudulent impersonation are against the decision. As a statutory question, but for this decision, the liability of the drawer would seem clear under the last clause of the section."

[After analyzing the opinion of the court in the Tolman case, and reviewing Dean Ames' and Judge Brewster's discussion of it, Mr. McKeehan continues:]

It is perfectly evident, then — and indeed this is Professor Ames' position — that the trouble is not with Section 23, but with the case of *Tolman v. The Bank*. Undoubtedly it is unfortunate that the only judicial interpretation that this section has received should serve only to throw doubt on what was previously well settled.<sup>7</sup> But the blame

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<sup>7</sup> It is not denied that much might be said in favor of the result reached in *Tolman v. The Bank*, did the question arise *de novo*. The point is that when

does not belong to the Negotiable Instruments Law. Section 23 — copied from the English act — was, at the time of its adoption, an accurate statement of existing law, and in view of the unanimity that exists among the cases on which it is based, the doubts raised by *Tolman v. The Bank* will probably soon be dispelled and this section will be interpreted as having merely affirmed a well settled rule.

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once so difficult and doubtful a point is clearly settled, mischief and not good results from reopening the matter and involving it in doubt. As matters stand to-day, no lawyer could advise a client, with any certainty, on this point.



## ARTICLE III.

### CONSIDERATION OF NEGOTIABLE INSTRUMENTS.

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#### I. Presumption of consideration.

§ 50

BRISTOL v. WARNER.

19 CONNECTICUT, 7. — 1848.

ASSUMPSIT on the following instrument:

“ On demand, after my decease, I promise to pay Josiah W. Bristol, or order, eight hundred and fifty dollars, without interest.”

The making of the instrument being admitted, the plaintiff introduced the instrument in evidence and rested his case. The court charged that the note imported on its face a valuable consideration; that it was a promissory note and not a testamentary paper. Conflicting evidence was given as to the consideration. Verdict for plaintiff.

CHURCH, CH. J. — 1. The question first presented by this motion, is whether the note in controversy imports on its face a valuable consideration? We think it does; and that the charge to the jury on this point was correct. It has now become the settled law of this state, after a time of some doubt, that a promissory note not negotiable, and not purporting on its face to be for value received, does not imply a consideration; and that a plaintiff, prosecuting such a note, is left to prove one, or fail to recover.<sup>1</sup> (*Edgerton v. Edgerton*, 8 Conn. R. 6.)

But this note is, in form, negotiable, though not yet negotiated; and no consideration is expressed in it. And, therefore, it was claimed at the trial, that it should be treated as if it were not negotiable paper;—that it, being a simple contract, and as yet confined in its operation to the original parties to it, required proof of consideration. But we believe that the negotiability of the note gave it a character and a credit at its inception, then importing a consideration, as well between payer and payee, as between the maker and indorsers or subsequent holders. We suppose this court so regarded it in the case of *Camp v. Tompkins* (9 Conn. R. 445), in which it is said, that such instruments, as well as bills of exchange, from their very nature, import a consideration. Our statute making a certain description of notes negotiable,

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<sup>1</sup> Contra: *Carnwright v. Gray*, 127 N. Y. 92. But see Neg. Inst. L., § 320. — H.

intended to give to them the same effect here, as such paper was known to have in England, and in the commercial community generally. The most respectable elementary writers upon this branch of the law, treat this as a well established principle. Mr. Chitty says: "In the case of bills of exchange and promissory notes, they are presumed to *have been* on good consideration; and it is not necessary for the plaintiff to state any in his declaration, or prove it, in the first instance, on the trial," etc. Evans, in his learned commentary on Pothier, remarks, that "the case of bills of exchange and promissory notes affords, in some degree, an exception to the general rule, which has been under discussion, when they are indorsed over for a valuable consideration; the want of consideration, between the original parties is immaterial; as *between them* a consideration is presumed; but if the contrary is shown it is a sufficient defense." Chancellor Kent, in his commentaries, speaks thus: "It is usual to insert *value received* in a bill or note; but this is unnecessary and value is implied in every bill, note, or indorsement." (Chitty on Bills, 67; 2 Pothier on Obligations, 22; 3 Kent's Com. 50; 1 Stephen's N. P. 766; *Goshen & Minisink Turn. Co. v. Hurtn*, 9 Johns. R. 217; *Manderiville v. Welch*, 5 Wheat. 277; 2 McLean, 212.) And yet, there is an essential difference between promissory notes before they are indorsed, and afterwards, in respect to their original consideration. In the former case, a consideration is implied, but may be denied in defense; while in the latter, only in special cases; it cannot be disputed if the holder be a meritorious one, receiving the paper before due. \* \* \* New trial not to be granted.<sup>2</sup>

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<sup>2</sup> The doctrine that a bill or note requires *any* consideration is of comparatively recent origin. It was unknown in the time of Blackstone (2 Comm. 446), and early American cases are to be found in which it appears to be denied or doubted. (*Bowers v. Hurd*, 10 Mass. 427; *Livingston v. Hastie*, 2 Cai. [N. Y.] 246.) But the modern cases now uniformly hold that a bill or note executed and delivered as a gift is unenforceable for want of consideration. *Hill v. Buckminster*, 5 Pick. (Mass.) 391; *Parish v. Stone*, 14 Pick. (Mass.) 198; *Schoonmaker v. Roosa*, 17 Johns. (N. Y.) 301; *Harris v. Clark*, 3 N. Y. 93. Nor will a meritorious consideration sustain a promissory note even in equity. *Whitaker v. Whitaker*, 52 N. Y. 368. See also *Matter of James*, 146 N. Y. 78 (bond and mortgage), but see 37 Am. L. Reg. 337.

The cases are uniform that a bill and a negotiable note have presumptive consideration. 1 Daniel on Neg. Inst., §§ 161-163. Whether non-negotiable notes import a consideration is a matter of the construction of the statute governing promissory notes. *Ibid.*, § 163; Art. XVII, Div. I. 3, *post*. As to burden of proof, see Neg. Inst. L., § 98.

The courts do not inquire into the adequacy of the consideration; but inadequacy of consideration may be evidence of bad faith or fraud. *Jones v. Gordon*, L. R. 2 App. Cas. 616; *Huffcut's Anson* (8th Eng. ed.), pp. 90-92. — H.

## § 50

HICKOK *v.* BUNTING.

92 APPELLATE DIVISION (N. Y.) 167. — 1904.

O'BRIEN, J. This case has already been before this court. *Hickok v. Bunting*, 67 App: Div. 360. The action is upon an instrument in the nature of a promissory note, a copy of which is as follows:

NEW YORK, December —, 1893.

Having been cause of a money loss to my friend, Geraldine H. Hickok, I have given her three thousand dollars. I hold this amount in trust for her and one year after date or thereafter, on demand, I promise to pay to the order of Geraldine H. Hickok, her heirs or assigns, Three thousand dollars with interest.

ELLA F. BUNTING.

216 East 12th St., N. Y.

1, 16, '94.

Upon the former trial, after the plaintiff had proved the signature, and introduced the note in evidence, and given some testimony in support of its validity, the defendants on their part offered evidence which it was thought by this court threw doubt upon the delivery of the note and raised the question as to whether or not there was consideration therefor. For these reasons a judgment directed for the plaintiff, from which the defendants appealed, was reversed, this court holding that there were presented questions of fact which should have been submitted to the jury. Upon the new trial the plaintiff contented herself with proving the signature and the amount of interest due, and, relying upon the presumption of delivery from the possession of the note, offered it in evidence, and rested. The defendants moved to dismiss the complaint, and to the denial of their motion excepted, and then in turn rested; and, the plaintiff having moved for a direction in her favor, that motion was granted, and to this ruling the defendants excepted, so that it is these exceptions to the refusal to dismiss the complaint and to the direction of a verdict for the plaintiff which are now urged upon our attention.

Had this been a negotiable promissory note in the usual form, we do not think it would be seriously contended that upon such a record as is here presented a direction of a verdict would not have been proper. The defendants contend, however, that, though this instrument be regarded as a promissory note, it is of an unusual kind, and that all the parts of the instrument must be read together, and that, inasmuch as on its face it purports to state a consideration which is neither a legal nor a valid consideration, the one expressed takes the place of the valid consideration which, if such a statement had not appeared upon the face of the note, would be presumed. For this proposition the appellant claims support by taking certain language in our former opinion away from its context, and considering it apart from the subject in the discussion of which it was used. The portion from which the appellants get most comfort is the following:

"The recital is that the deceased had been the cause of a money loss. This standing alone, would be insufficient to show the existence of a present legal consideration, or that an enforceable obligation had ever existed. \* \* \* If we eliminate the declaration of the plaintiff that the deceased owed her a debt, then we have nothing in the oral testimony or in the recital of the instrument to establish that there at any time existed a legal enforceable obligation against the deceased in favor of the plaintiff, or that the facts were of such a character as would estop the deceased from denying her legal obligation for the payment of the money."

This language was not intended to be, nor was it, confined to stating that the recital which preceded the promissory portion of the instrument was conclusive either upon the plaintiff or the defendant. What the court was discussing was whether, upon all the evidence — that presented on the face of the instrument, together with such corroborating evidence as the plaintiff adduced upon that subject, as offset by the testimony offered by the defendants — the situation was one which, upon the question of consideration, required that their case should be submitted to the jury (which was the conclusion we reached), or whether the trial judge was right on the first trial in directing a verdict. As we have pointed out, upon the present trial there was practically no evidence given except such as was needed to entitle the paper to be admitted in evidence. That the paper was a promissory note was expressly held upon the former appeal, and in the following language:

"Following the declaration of trust the instrument contains a promise to pay, one year after date, or on demand, to the order of the plaintiff, her heirs or assigns, \$3,000, with interest. There are no words of limitation of this promise in the language preceding it. The promise to pay is express, and is to the order of the payee, and contains every essential element to constitute a promissory note as defined by the Negotiable Instruments Law (chapter 612, p. 755, § 320, Laws 1897) and by authority. *Carnwright v. Gray*, 127 N. Y. 92."

The contention of the appellants may be well founded that if, on the face of the instrument, it conclusively appeared that there was no consideration, or that there was an invalid consideration, then the instrument could not be enforced. For the reason, however, that neither of these appeared upon the face of the instrument, we think that, taking the legal presumption which arises in favor of there having been a valid consideration for the note, and in the absence of any evidence to rebut it, a *prima facie* case was made out.

In *Hegeman v. Moon*, 131 N. Y. 462, the deceased made an instrument as follows:

"One year after my death I hereby direct my executors to pay to Joseph Hegeman, his heirs, executors or assigns, the sum of \$1,976.90, being the balance due him for cash advanced at various times by

him to Adrian Hegeman, my son, and others as per statement rendered by him this day without interest."

In that case, as in this, the inference was sought to be drawn from the language employed in the note that there was no legal consideration; but the court said:

"The addition of the words that the money is due the payee 'for cash advanced at various times by him to Adrian Hegeman, my son, and others, as per statement rendered by him this day,' does not alter the implication that the money is due the payee from the maker. It simply states the origin of the indebtedness of the maker. It was not for money advanced directly to her, but to her son and others. There is nothing inconsistent with her indebtedness to the payee in the fact of this acknowledged advance of the money to the maker's son. An original indebtedness may have arisen against the maker by the payee advancing at the maker's request moneys to her son. And when she says that a certain amount is due the payee, and signs the statement, with the addition of the origin of the indebtedness, the implication is neither forced nor unnatural that she means that the amount is due from her, or else she would not have signed the paper."

We think the respondent is right in asserting that the principle of the Hegeman case and the one at bar are precisely the same, and that, as in the former, the court was bound to presume in support of the obligation that the money advanced to a third person by the payee was advanced at the maker's request, and thus constituted a legal obligation on the part of the maker, so, in the present case, the court is bound to assume that the money loss which the plaintiff, the payee, had suffered at the hands of the maker, was legally chargeable to the maker, and constituted a legal liability on her part.

Our conclusion therefore is that the disposition made by the learned trial judge was right, and that the judgment appealed from should be affirmed, with costs.

All concur.<sup>3</sup>

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<sup>3</sup> Affirmed 182 N. Y. 530, no opinion.

In *Huntington v. Shute*, 180 Mass. 371, payee sued makers on a promissory note containing the words "value received." Defense was want of consideration. The trial judge instructed the jury that the words "value received" were equivalent to a declaration and admission on the part of the defendants that they had received full value, and that where as here the makers had admitted consideration in the note itself, the burden of proof was upon the defendants to show that there was no consideration. Held error. "The rule is well settled in this Commonwealth that, in an action on a promissory note, the burden of proof is upon the plaintiff to establish the fact that it is given for a valuable consideration. While the production of the note, with the admission or proof of the signature, makes a *prima facie* case, yet if the defendant puts in evidence of a want of consideration, the burden of proof does not shift, but remains upon the plaintiff, who must satisfy the jury, by a fair preponderance of the evidence, that the note was for a valid consideration. . . . We can see no reason for changing the rule so well established merely because the note contains the words 'value received.'" LATHROP, J., on p. 372. — C.

## II. What constitutes consideration.

### § 51 RAILROAD COMPANY *v.* NATIONAL BANK.

102 UNITED STATES, 14. — 1880.

ACTION by the bank against the railroad company on a promissory note. Defense, that the note was diverted by the defendant's agent, and that the bank is not a holder for value and therefore subject to the defence.

The note was made by the company payable to William V. Le Count, its treasurer, and indorsed by him in blank and by Palmer & Co., owners of the larger portion of the stock. The note thus indorsed was placed by the company in the hands of Hutchinson & Ingersoll, note-brokers, for negotiation and sale in order to raise money for the company. Hutchinson & Ingersoll pledged the note as collateral for a loan, and subsequently agreed that it should stand as collateral for a loan previously made. No agreement was made to extend the pre-existing debt, or to refrain from calling it in.

Mr. Justice HARLAN, after stating the facts, delivered the opinion of the court. \* \* \*

The bank, we have seen, received the note, before its maturity, indorsed in blank, without any express agreement to give time, but without notice that it was other than ordinary business paper, or that there was any defense thereto, and in ignorance of the purposes for which it had been executed and delivered to Hutchinson & Ingersoll. Did the bank, under these circumstances, become a holder for value, and as such entitled, according to the recognized principles of commercial law, to be protected against the equities or defenses which the railroad company may have against the other parties to the note?

This question was carefully considered, though, perhaps, it was not absolutely necessary to be determined, in *Swift v. Tyson* (16 Pet. 1.) \* \* \*

The opinion in that case has been the subject of criticism in some courts, because it seemed to go beyond the precise point necessary to be decided, when declaring that the *bona fide* holder of a negotiable note, taken as collateral security for an antecedent debt, was protected against equities existing between the original or antecedent parties. The brief dissent of Mr. Justice Catron was solely upon that ground, which renders it quite certain that the whole court was aware of the extent to which the opinion carried the doctrines of the commercial law upon the subject of negotiable instruments transferred or delivered as security for antecedent indebtedness. In the judgment of this court, as then constituted (Mr. Justice Catron alone excepted), the holder of a negotiable instrument, received before maturity, and without notice of any defense thereto, is unaffected by the equities or defenses of antecedent parties, equally whether the note is taken as

collateral security for or in payment of previous indebtedness. And we understand the case of *McCarty v. Roots* (21 How. 432), to affirm *Swift v. Tyson*, upon the point now under consideration. It was there said: "Nor does the fact that the bills were assigned to the plaintiff as collateral security for a pre-existing debt impair the plaintiff's right to recover." (p. 438.) "The delivery of the bills to the plaintiff as collateral security for a pre-existing debt, under the decision of *Swift v. Tyson*, was legal." (p. 439.)

It may be remarked in this connection that the courts holding a different rule have uniformly referred to an opinion of Chancellor Kent in *Bay v. Coddington* (5 Johns. Ch. [N. Y.] 54), reaffirmed in *Coddington v. Bay* (20 Johns. [N. Y.] 637.) There is, however, some reason to believe that the views of that eminent jurist were subsequently modified. In the later editions of his Commentaries (vol. III, p. 81, note b.), prepared by himself, reference is made to *Stalker v. McDonald* (6 Hill [N. Y.] 93), in which the principles asserted in *Bay v. Coddington* were re-examined and maintained in an elaborate opinion by Chancellor Walworth, who took occasion to say that the opinion in *Swift v. Tyson* was not correct in declaring that a pre-existing debt was, of itself, and without other circumstances, a sufficient consideration to entitle the *bona fide* holder, without notice, to recover on the note, when it might not, as between the original parties, be valid. But Chancellor Kent adds: "Mr. Justice Story, on Promissory Notes (p. 215, note 1), repeats and sustains the decision in *Swift v. Tyson*, and I am inclined to concur in that decision as the plainer and better doctrine." Of course it did not escape his attention that the court in *Swift v. Tyson* declared the equities of prior parties to be shut out as well when the note was merely pledged as collateral security for a pre-existing debt, as when transferred in payment or extinguishment of such debt.

According to the very general concurrence of judicial authority in this country as well as elsewhere, it may be regarded as settled in commercial jurisprudence — there being no statutory regulations to the contrary — that where negotiable paper is received in payment of an antecedent debt;<sup>4</sup> or where it is transferred, by indorsement, as collateral security for a debt created, or a purchase made, at the time of transfer;<sup>5</sup> or the transfer is to secure a debt, not due, under an agreement, express or to be clearly implied from the circumstances, that the collection of the principal debt is to be postponed or delayed until the collateral matured; or where time is agreed to be given and is actually given upon a debt overdue, in consideration of the transfer of negotiable paper as collateral security therefor;<sup>6</sup> or where

<sup>4</sup> Accord: *Mayer v. Heidelberg*, 123 N. Y. 332. — H.

<sup>5</sup> *Bank v. Vanderhorst*, 32 N. Y. 553. — H.

<sup>6</sup> The agreement for extension must be definite and binding. *Atlantic N. B. v. Franklin*, 55 N. Y. 235. — H.

the transferred note takes the place of other paper previously pledged as collateral security for a debt, either at the time such debt was contracted or before it became due — in each of these cases the holder who takes the transferred paper, before its maturity, and without notice, actual or otherwise, of any defense thereto, is held to have received it in due course of business, and, in the sense of the commercial law, becomes a holder for value, entitled to enforce payment, without regard to any equity or defense which exists between prior parties to such paper.

Upon these propositions there seems at this day to be no substantial conflict of authority. But there is such conflict where the note is transferred as collateral security *merely*, without other circumstances, for a debt previously created. One of the grounds upon which some courts of high authority refuse, in such cases, to apply the rule announced in *Swift v. Tyson* (16 Pet. 1), is, that transactions of that kind are not in the usual and ordinary course of commercial dealings. But this objection is not sustained by the recognized usages of the commercial world, nor, as we think, by sound reason. The transfer of negotiable paper as security for antecedent debts constitutes a material and an increasing portion of the commerce of the country. Such transactions have become very common in financial circles. They have grown out of the necessities of business, and, in these days of great commercial activity they contribute largely to the benefit and convenience both of debtors and creditors. \* \* \* Another ground upon which some courts have declined to sanction the rule announced in *Swift v. Tyson* is, that upon the transfer of negotiable paper merely as collateral security for an antecedent debt nothing is surrendered by the indorsee — that to permit the equities between prior parties to prevail deprives him of no right or advantage enjoyed at the time of transfer, imposes upon him no additional burdens, and subjects him to no additional inconveniences.

This may be true in some, but it is not true in most cases, nor, in our opinion, is it ever true when the note, upon its delivery to the transferee, is in such form as to make him a party to the instrument, and impose upon him the duties which, according to the commercial law, must be discharged by the holder of negotiable paper in order to fix liability upon the indorser.

The bank did not take the note in suit as a mere agent to receive the amount due when it suited the convenience of the debtor to make payment. It received the note under an obligation imposed by the commercial law, to present it for payment, and give notice of non-payment, in the mode prescribed by the settled rules of that law. We are of opinion that the undertaking of the bank to fix the liability of prior parties, by due presentation for payment and due notice in case of non-payment — an undertaking necessarily implied by becom-



ing a party to the instrument — was a sufficient consideration to protect it against equities existing between the other parties, of which it had no notice. It assumed the duties and responsibilities of a holder for value, and should have the rights and privileges pertaining to that position. \* \* \*

Our conclusion, therefore, is that the transfer, before maturity, of negotiable paper, as security for an antecedent debt merely, without other circumstances, if the paper be so indorsed that the holder becomes a party to the instrument, although the transfer is without express agreement by the creditor for indulgence, is not an improper use of such paper, and is as much in the usual course of commercial business as its transfer in payment of such debt. In either case, the *bona fide* holder is unaffected by equities or defenses between prior parties, of which he had no notice. \* \* \*

[Mr. Justice CLIFFORD concurred in an opinion of great learning, but of too great length to be reprinted here.]

Mr. Justice BRADLEY. I concur in the judgment rendered in this case, and in most of the reasons given in the opinion. But, in reference to the consideration of the transfer of the note as collateral security, I do not regard the obligation assumed by the indorsee (the bank), to present the note for payment and give notice of non-payment, as the only, or the principal, consideration of such transfer. The true consideration was the debt due from the indorsers to the indorsee, and the obligation to pay or secure said debt. Had any other collateral security been given, as a mortgage, or a pledge of property, it would have been equally sustained by the consideration referred to; namely, the debt and the obligation to pay it or to secure its payment. If the indorsers had assigned a mortgage for that purpose, the title of the bank to hold the mortgage would have been indubitable. In that case prior equities of the mortgagor might have prevailed against the title of the bank; because a mortgage is not a commercial security, and its transfer for any consideration whatever does not cut off prior equities. But the *bona fide* transfer of commercial paper before maturity does cut off such equities; and every collateral is held by the creditor by such title and in such manner as appertain to its nature and qualities. Security for the payment of a debt actually owing is a good consideration, and sufficient to support a transfer of property. When such transfer is made for such purpose, it has due effect as a complete transfer, according to the nature and incidents of the property transferred. When it is a promissory note or bill of exchange, it has the effect of giving absolute title and of cutting off prior equities, provided the ordinary conditions exist to give it that effect. If not transferred before maturity or in due course of business, then, of course, it cannot have such effect. But I think it is well shown in the principal opinion

that a transfer for the purpose of securing a debt is a transfer in due course. And that really ends the argument on the subject.

Mr. Justice MILLER and Mr. Justice FIELD dissented.

Judgment affirmed.<sup>7</sup>

## § 51

## GROCERS' BANK v. PENFIELD.

69 NEW YORK, 502. — 1877.

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department reversing a judgment in favor of defendants, entered upon the report of a referee. (Reported below, 7 Hun, 279.)

This action was upon two promissory notes, on which defendants Penfield and Stone were makers, which were made payable to defendant Truax, and by him indorsed and transferred to plaintiff.

The referee found, in substance, that the notes were executed by the makers without any consideration; were accommodation notes, and were received by plaintiff solely as collateral security for a precedent debt, without any agreement to extend the time of payment of the debt, and thereupon held that plaintiff was not a *bona fide* holder for value, and directed judgment dismissing the complaint as to said makers.

RAPALLO, J. We think that the order in this case must be affirmed on the ground stated by Brady, J., in his opinion delivered at General Term. Whatever confusion may have existed upon the point, we think that we may now safely say, in the language of Professor Parsons (1 Parsons on Notes and Bills, 296), that it is universally conceded that the holder of an accommodation note, without restriction as to the mode of using it, may transfer it either in payment or as collateral security for an antecedent debt, and the maker will have no defense. (See, also, Story on Bills, § 192, note *m*, and Story on Notes, § 195, and authorities cited.) The existing debt is a sufficient consideration for the transfer, and no new consideration need be shown. It is only where the note has been diverted from the purpose for which it was entrusted to the payee, or some other equity exists in

<sup>7</sup> "We are of the opinion that a creditor to whom a negotiable security is given on account of a pre-existing debt holds it by an indefeasible title, whether it be one payable at a future time or on demand." *Currie v. Misa*, L. R. 10 Ex. 153, Lord Coleridge, C. J., dissenting.

It was probably the intent of the framers of § 51 of the Neg. Inst. L. to abolish the rule established in *Coddington v. Bay*, 20 Johns. 637, and ever since in force in New York; whether the language used is apt for that purpose will be a question of judicial determination. — H. [On this point, see the New York cases referred to in *Birket v. Elward*, 68 Kan. 295, *post*. — C.]

favor of the maker, that it is necessary that the holder should have parted with value on the faith of the note, in order to cut off such equity of the maker. (*Cole v. Saulpaugh*, 48 Barb. 104; *Bank of Rutland v. Buck*, 5 Wend. 66; *Lathrop v. Morris*, 3 Sandf. 7.) It has been held by high authority that an antecedent debt is sufficient even in the case of a note fraudulently diverted to constitute the holder a *bona fide* holder for value without any extension of time or surrender of securities or other new considerations. (*Swift v. Tyson*, 16 Peters, 1.) But in this State that doctrine does not prevail. (*Stalker v. McDonald*, 6 Hill, 93.) The leading authorities upon the subject are reviewed in the case of *Maitland v. Citizens' Bank* (40 Maryland, 540). Whatever difference of opinion may have existed, as to the case of a note diverted or fraudulently put in circulation, it must be regarded as settled that an indorsee of a negotiable note made for the accommodation of the indorser, but without restriction as to its use, taking the note in good faith as collateral security for an antecedent debt, and without other consideration, is entitled to the position of a holder for value, and not affected by the defense of want of consideration to the maker. We should not have deemed it necessary to discuss the point so much at length, but for the reason that it does not appear ever to have been previously expressly adjudicated in this court.

The order should be affirmed and judgment absolute, etc.

All concur.

Order affirmed and judgment accordingly.<sup>8</sup>

## § 51

## BIRKET v. ELWARD.

68 KANSAS, 295. — 1904.

PLAINTIFF sues as indorsee upon a promissory note which he acquired from the payee as collateral security for an existing debt of the payee to him, without any agreement for an extension of time or other new consideration. Judgment for defendants and plaintiff brings error.

MASON, J. \* \* \*

It is obvious that plaintiff could only recover on the theory that he was an innocent purchaser, and the sole question here involved, therefore, is whether one who takes commercial paper as collateral security for an existing debt, without an agreement for an extension of time or other new consideration, is ever entitled to protection as a *bona fide* holder. If so, the judgment must be reversed; otherwise it must be affirmed.

The rule in the federal courts, as well as in those of England and Canada, is that the holder of a negotiable note taken as collateral security for a pre-existing debt is a holder for value in due course

<sup>8</sup> See also *Continental N. B. v. Townsend*, 87 N. Y. 8. — H.

of business, and as such is protected against all latent equities of third parties. The state courts that have passed upon the question are in irreconcilable conflict. The cases are collected in 4 A. & E. Encycl. of L. (2d. Ed.), 290-293, and in 7 Cyc. 932-935. The lists there indicate with substantial but not absolute correctness the line of cleavage. It is to be noted that in each of them Kansas is wrongly placed among the states that are committed to the rule stated, upon the strength, respectively, of the cases of *Bank v. Dakin*, 54 Kan. 656, and *Best v. Crall*, 23 Kan. 482. While these cases have a tendency in that direction, they do not go the full length indicated. In *Bank v. Dakin* the note involved was transferred as collateral security for a debt created at the time of, and in reliance upon, such transfer, which was therefore supported by a new consideration, sufficient upon any theory of the law. In the opinion a number of cases are cited as supporting the proposition that even a pre-existing debt would afford a sufficient consideration for the purpose, and among them was included *Best v. Crall*. In that case the collateral note was in fact transferred as security for a debt that already existed, but this was done pursuant to a promise made when such original debt was created, so that the effect was the same as though the transfer had actually been made at that time.

A careful examination of the cases cited in the lists referred to discloses that in the following states the rule of the federal court has been adopted: California, Colorado, Connecticut, Georgia, Illinois, Indiana, Louisiana, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, Rhode Island, South Carolina, Texas, Vermont, and West Virginia. In California and Nevada the matter is affected by statutory provisions that the acceptance of the security forfeits a right to attach. Nebraska is also now committed to this doctrine. *Lashmett v. Prall*, 96 N. W. 152. Such citations further show that in the following states the rule has been denied: Alabama, Arkansas, Iowa, Kentucky, Maine, Michigan, Mississippi, Missouri, New Hampshire, New York, North Dakota, Ohio, Pennsylvania, Tennessee, Virginia, Wisconsin. North Carolina should also be placed on this list, but there, as well as in Tennessee and Virginia, the legislature has lately changed the rule by statute.<sup>9</sup> See *Brooks v. Sullivan*, 129 N. C. 190; *Bank of Charleston v. Johnson*, 105 Tenn. 521; *Payne v. Zell*, 98 Va. 294.<sup>10</sup> In New York, in 1897, in a revision of the law of nego-

<sup>9</sup> Namely, the Negotiable Instruments Law. — C.

<sup>10</sup> See, also, to the same effect, *Graham v. Smith*, 155 Mich. 65. At p. 68, BLAIR, J., says: "If, as contended by defendant's counsel, the plaintiff received the note as collateral security for an existing debt, and the Negotiable Instruments Act, Pub. Acts 1905, p. 389, No. 265, has introduced no change in the law as to such instruments, plaintiff was not a holder for value. *Burroughs v. Ploof*, 73 Mich. 607; *Maynard v. Davis*, 127 Mich. 571. Section 27 of the act is as follows: 'Value is any consideration sufficient to support a simple con-

tible instruments, it was enacted that "value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value."<sup>11</sup> It was held in *Brewster v. Shrader*, 26 Misc. 480, that this statute changed the law as formerly administered in that state, and that under it "an indorsee of a note taken as collateral to a pre-existing indebtedness is a holder for value, unaffected by equities between the original parties." But in *Sutherland v. Mead*, 80 App. Div. 103, this was denied, and it was said that the new statute was purely declaratory. We do not discover that the New York Court of Appeals has passed upon the effect of this legislation.

What may fairly be called the minority doctrine originated in New York in *Bay v. Coddington*, 5 Johns. Ch. 54,<sup>12</sup> the opinion being written by Chancellor Kent. The leading case in this country on the majority side is *Swift v. Tyson*, 16 Pet. 1, 10 L. Ed. 865, the opinion being written by Justice Story. It was there declared that one who took negotiable paper in payment of or as security for a pre-existing debt was a holder for value and in due course of business, and the argument was made in support of that express proposition. But the reference to paper taken as security was not required by the facts of the case, and Justice Catron dissented on this ground. In *Railroad Co. v. National Bank*, 102 U. S. 14, the same reasoning was adopted and applied in a case where the transfer was made merely to secure an antecedent debt. The note there involved had several indorsers, and the obligation assumed by the last holder to give them notice of non-payment was treated as a part of the consideration of the transfer, but the decision did not turn upon this treatment. And in *American File Co. v. Garrett*, 110 U. S. 288, the principle was applied where there were no prior indorsers. In the opinion in *Railroad Co. v. National Bank* it was noted (citing 3 Kent's Commentaries, p. 81, note "b") that Chancellor Kent, after the decision in *Swift v. Tyson*, indicated that he was inclined to concur in it, as the plainer and better doctrine.

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tract. An antecedent or pre-existing debt constitutes value, and is deemed such whether the instrument is payable on demand or at a future time.' Section 29 provides: 'Where the holder has a lien on the instrument, arising either from contract or by implication of law, he is deemed a holder for value to the extent of his lien.' We are of the opinion that it was the intention of the Legislature to change the rule theretofore prevailing in this state 'so that any person to whom a negotiable security has been pledged as collateral would be a holder for value to the extent of the amount due him.' *Payne v. Zell*, 98 Va. 294; *Mersick v. Alderman*, 77 Conn. 634; *Brooks v. Sullivan*, 129 N. C. 190. See, also, *Petrie v. Miller*, 57 App. Div. 17, affirmed without opinion, 173 N. Y. 596." — C.

<sup>11</sup> § 52. — C.

<sup>12</sup> A passing reference to this case in *Bank of America v. Waydell*, 187 N. Y. 115, serves, to some extent, to continue the doubt as to what position the New York Court of Appeals will take on this question. See editorial in the *New York Law Journal* for Jan. 18, 1907, at p. 1302. — C.

The *Bay-Coddington* case and the *Swift-Tyson* case are cited in almost every opinion in which the merits of the question under consideration are discussed, and the state courts have ordinarily taken sides upon the matter as the arguments of the one decision or the other have appealed to them with the greater force. In the former case it is said: "It is the credit given to the paper, and the consideration *bona fide* paid on receiving it, that entitles the holder, on grounds of commercial policy, to such extraordinary protection, even in cases of the most palpable fraud. It is an exception to the general rule of law, and ought not to be carried beyond the necessity that created it." In the latter case it is said: "Receiving it [a negotiable instrument] in payment of or as security for a pre-existing debt is according to the known usual course of trade and business. And why, upon principle, should not a pre-existing debt be deemed such a valuable consideration? It is for the benefit and convenience of the commercial world to give as wide an extent as practicable to the credit and circulation of negotiable paper, that it may pass not only as security for new purchases and advances, made upon the transfer thereof, but also in payment of, and as security for, pre-existing debts. The creditor is thereby enabled to realize or to secure his debt, and thus may safely give a prolonged credit, or forbear from taking any legal steps to enforce his rights. The debtor also has the advantage of making his negotiable securities of equivalent value to cash. But establish the opposite conclusion, that negotiable paper cannot be applied in payment of or as security for pre-existing debts, without letting in all the equities between the original and antecedent parties, and the value and circulation of such securities must be essentially diminished, and the debtor driven to the embarrassment of making a sale thereof, often at a ruinous discount, to some third person, and then by circuitry to apply the proceeds to the payment of his debts."

Among other arguments advanced in behalf of the majority view are that the question is really one of the law merchant — the custom of merchants — and that a "transfer by a debtor to his creditor of a negotiable instrument, to pay or only to secure a prior debt, makes the creditor a holder for value, by the custom" (Bigelow on Bills, Notes & Cheques, 247); that the creditor, in accepting a negotiable note, whether or not there are parties to be charged by notice, does undertake to exercise some degree of diligence (2 Randolph on Commercial Paper, § 804), thereby affording a new consideration, or at all events that he "is naturally lulled into security and inactivity by crediting the face of the note, and he should not be made to suffer by the maker for confidence which his own promise created" (1 Daniel on Neg. Inst., § 831a); that the true consideration for the transfer is the debt due from the indorser to the indorsee, and the obligation to pay or secure said debt; that such transfer is a sufficient consideration, because "security for the payment of a debt actually owing is a good

consideration, and sufficient to support a transfer of property" (separate opinion of Justice Bradley in *Railroad Co. v. Nat. Bank*, *supra*), That the policy of the law is to facilitate the transfer of negotiable paper free of equities is illustrated by the fact that it is almost universally held that one who acquires it in payment of an antecedent debt is a *bona fide* holder (*Draper v. Cowles*, 27 Kan. 484; 4 A. & E. Encycl. of Law [2d ed.] 285), whereas the ordinary rule in reference to protection under recording acts is that one who accepts property in satisfaction of an existing debt is not an innocent purchaser (4 A. & E. Encycl. of L. [2d ed.] 490; *Dolan v. Van Demark*, 35 Kan. 304; *Henderson v. Gibbs*, 39 Kans. 680.) Even where the New York doctrine is accepted, an exception is made against the plea of lack of consideration when made by an accommodation party to the paper transferred as security. *Grocers' Bank v. Penfield*, 69 N. Y. 502; *Maitland v. Citizens' Bank*, 40 Md. 540; *Smith v. Wachob*, 179 Pa. 260.

If the question were a new one, to be determined upon consideration of equitable principles, there would be strong reasons for holding that he who takes a note merely as security for an existing debt acquires no greater right than his debtor had. The reasons given in *Mann v. National Bank*, 30 Kan. 412, for applying this rule to a bank that receives a note from a depositor, and adds the amount to his account, which is not overdrawn, would seem to apply to the case of one who receives the paper as collateral for an indebtedness already existing. He parts with nothing, and is in no worse situation than he was before. It requires no variation of usual procedure to save him from loss. But on the other hand, the same arguments would reach the case of him who takes commercial paper in payment of an existing unsecured debt. He likewise is in no way placed in any worse situation than he was before, since, while the original debt may be regarded as technically canceled, he at all events has his remedy upon the collateral against the person from whom he received it, whatever defense might be available to the maker. He still has a valid claim against his original debtor, and that is all he had in the first place. See Randolph on Commercial Paper, §§ 461-465. Yet, as has just been said, one acquiring commercial paper under such circumstances is held to be protected as an innocent purchaser.

But the question before us is peculiarly one in which great weight should be given to the authorities, and especially to the decisions of the courts of the national government, which do not recognize any local law in such matters. *Oates v. National Bank*, 100 U. S. 239, 25 L. Ed. 580. The question is one likely to arise frequently in transactions between inhabitants of different states. It is important that the law should be uniform in the different jurisdictions. It was doubtless in recognition of this consideration that the legislatures of North Carolina, Tennessee, Virginia, and possibly New York, as already noted, have lately by statute brought their local laws on the

subject into harmony with the general law as administered by the federal and by the greater number of the state courts. We prefer to hold, in accordance with the weight of authority, that an indorsee of negotiable paper taken as security for a pre-existing debt is a holder for value and in due course of business, and therefore, in the absence of any circumstances charging him with notice, is protected against a claim of payment made to the original payee. \* \* \*

The judgment is reversed, and the cause remanded for a new trial. All the justices concurring.<sup>13</sup>

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### III. Holder for value.

#### § 52

#### HUNTER v. WILSON.

4 EXCHEQUER REPORTS, 489. — 1849.

THIS was an action by the plaintiff, as indorsee of a bill of exchange, against the defendant, as acceptor. The defendant pleaded (in substance), that the bill of exchange was drawn by one McLean, at the request and for the accommodation of the defendant, and without any consideration or value whatever, and that the bill was indorsed by the said McLean without any consideration or value given by the plaintiff for such indorsement, to the defendant, or to the said McLean, or to any other person whomsoever. The plaintiff had signed interlocutory judgment upon this plea, the defendant being under terms of pleading issuably. A rule *nisi* was subsequently obtained, on the part of the defendant, to set this judgment aside, but without any affidavit of merits.

*Willes* now showed cause.—The plaintiff was clearly entitled to sign judgment, for the plea is not issuable. It is quite consistent with the plea that there was a good consideration given for the bill. It may have passed through many hands, each party having given consideration. [ROLFE, B.—It may have been indorsed to A. B., who made a present of it to the plaintiff.] Or the defendant may have owed a debt to some third party. The allegation that the bill was drawn for the accommodation of the defendant is absurd. [ROLFE, B.—The plaintiff may be the executor of a person who gave full value for it.] He was then stopped by the court, who called upon

*Barnard*, in support of the rule, who contended that the plea was good upon general demurrer.

PARKE, B. The plea is clearly not issuable, and the plaintiff was entitled to sign judgment. There is not even an allegation in the plea, that none of the previous parties to the bill had given value

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<sup>13</sup> See this case reported with exhaustive note in 1 A. & E. Ann. Cas. 272. — C.



for the indorsement. The rule, therefore, ought to be discharged, and with costs, as the defendant is not prepared with an affidavit of merits.

POLLOCK, C. B., ALDERSON, B., and ROLFE, B., concurred.

Rule discharged, with costs.<sup>1</sup>

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§ 52

ARPIN *v.* OWENS.

140 MASSACHUSETTS, 144. — 1885.

JUDGMENT for defendant and plaintiff alleged exceptions.

W. ALLEN, J. This was an action by the payee of a foreign bill of exchange against the acceptor. The bill was dated February 23rd, payable in thirty days after date, and was accepted March 1st. There was evidence that the plaintiff took the bill from the drawer on the day of date, for value, in the regular course of business. The court ruled that the burden was on the plaintiff to prove that the defendant had received a consideration for the draft, and that, if the jury should find that he received no consideration, they should find for the defendant. There was evidence of want of consideration between the drawer and the defendant, and evidence bearing upon other grounds of defense, which is not material, as the ruling presented but one question for the jury. For the purposes of the ruling the plaintiff must be taken to be a *bona fide* purchaser of the bill for value, and without notice of want of consideration; and the question presented is whether, in an action by the payee of a bill, who took it before acceptance, against the acceptor, want of consideration between the drawer and acceptor is a defense; in other words, whether in such an action the rule to be applied as to want of consideration as a defense is that which obtains between the maker and payee of a note or that between the maker and indorsee. The rule is stated thus in Byles on Bills (6th Amer. Ed.) 206:

“Between immediate parties — that is, between the drawer and acceptor, between the payee and drawer, between the payee and maker of a note, between the indorsee and indorser — the only consideration is that which moved from the plaintiff to the defendant, and the absence or failure of this is a good defense to an action. But between the remote parties — for example, between the payee and the acceptor, between the indorsee and acceptor, between indorsee and remote indorser — two distinct considerations, at least, must come in question: *First*, that which the defendant received for his liability; and, *secondly*, that which the plaintiff gave for his title. An action between remote

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<sup>1</sup> Accord: *Hoffman v. Bank*, 12 Wall. (U. S.) 181. — C.

parties will not fail unless there be absence or failure of both these considerations."

The payee of an accepted bill holds the same relation to the acceptor that an indorsee of a note holds to the maker. There is a very close resemblance between an accepted bill and an indorsed note. The indorsed note is evidence of a debt originally due from the maker to the payee, and assigned and made due to the endorsee. The bill is evidence of a debt originally due from the drawee to the drawer, assigned and made due to payee; and the rule that the title of the assignee cannot be impeached by showing want of consideration for the original debt is applicable equally to the indorsee of a note, and to the payee and to the indorsee of an accepted bill. The reason, applicable alike to payee and indorsee, is tersely stated by VAUGHAN, J., in *Low v. Chifney*, 1 Bing. (N. C.) 267: "How was he to know what had passed between the drawer and acceptor." See *Davis v. Randall*, 115 Mass. 547.

It is contended by the defendant that the rule does not apply to the case at bar, because the acceptance was after the bill was purchased by the payee, and that, therefore, it was not taken by him on the faith of the acceptance. There is no ground for this distinction. It is immaterial when an acceptance is made; it may be made at any time, and the rights of the payee and of indorsees are the same after it is made whether they were acquired in anticipation of it or subsequent to it. It is held in this state that, upon the question whether a promise to accept made by the drawee to the drawer is an acceptance as to other parties, the knowledge of the promise, and presumed reliance upon it in becoming parties, is material. *Exchange Bank of St. Louis v. Rice*, 98 Mass. 288. But where, as in the case at bar, there is an acceptance upon the bill, it makes no difference in the rights of payees or indorsees whether they become such before or after the acceptance. See *Grant v. Hunt*, 1 C. B. 44; *Wynne v. Raikes*, 5 East, 514; *Powell v. Monnier*, 1 Atk. 611.

The instrument is negotiable before acceptance, and the acceptance is an acknowledgment of the debt it represents, and an absolute promise to pay it to the person who is or shall become the holder of the bill; and to allow a want of consideration for the acceptance to defeat the right of a *bona fide* holder, whether he became such before or after the acceptance, would be contrary to the nature and purpose of bills of exchange, and to the uniform usage in regard to them. Exceptions sustained.<sup>2</sup>

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<sup>2</sup> In *Heuertematte v. Morris*, 101 N. Y. 63, 70, the court says: "If a party becomes a *bona fide* holder for value of a bill before its acceptance, it is not essential to his right to enforce it against a subsequent acceptor, that an additional consideration should proceed from him to the drawee. The bill itself implies a representation by the drawer that the drawee is already in receipt of funds to pay, and his contract is that the drawee shall accept and pay according to the terms of the draft. (Parsons on Bills, 323, 544; *Arpin v.*

## § 53

## STODDARD v. KIMBALL.

6 CUSHING (Mass.) 469. — 1850.

SHAW, C. J. \* \* \* In the present case, it appearing that the note was negotiated to the plaintiffs before it was due, for a valuable consideration, and the jury having found that they took it without notice of the misapplication by the maker, it is clear that they have a right to recover; and the only remaining question is, for what amount they may recover. In general, the holder of an indorsed note will be entitled to recover the whole amount of the face of the note, because the presumption of fact, in the absence of counter proof, is, that he gave the full value for it, or that he took it from some other holder for value, to collect the amount, receive a certain part to his own use, and account to the party from whom he took it for the surplus. Having taken it to secure a pre-existing debt, of a less amount, he is a holder for value in his own right, only to the amount of the debt due him. If, therefore, it appears in proof, that the plaintiff is not accountable to any third person for any surplus, then there is no reason why he should recover any more than the balance of the debt, for which he is a *bona fide* holder for value. Here, it appears that the plaintiff received this note of the maker, for whose accommodation the defendant indorsed it. It being obvious that the plaintiff can recover nothing as trustee for the party from whom he received it, he is liable over to nobody for the surplus, and therefore can have judgment only for the amount due to himself, for his own use and in his own right which is so much of the note

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*Chapin*, 140 Mass. 144.) The drawee can, of course, upon presentment refuse to accept a bill, and in that event the only recourse of the holder is against the prior parties thereto; but in case the drawee does accept a bill, he becomes primarily liable for its payment, not only to its indorsees but also to the drawer himself.

“The delivery of a bill or check by one person to another for value implies a representation on the part of the drawer that the drawee is in funds for its payment, and the subsequent acceptance of such check or bill constitutes an admission of the truth of the representation, which the drawee is not allowed to retract. (*Daniel on Neg. Inst.*, 534; *Parsons on Bills*, 323, 544, 545.) By such acceptance the drawee admits the truth of the representation, and having obtained a suspension of the holder’s remedies against the drawer, and an extension of credit by his admission, is not afterwards at liberty to controvert the fact as against a *bona fide* holder for value of the bill.

“The payment to the drawer of the purchase price furnishes a good consideration for the acceptance which he then undertakes shall be made, and its subsequent performance by the drawee is only the fulfillment of the contract which the drawer represents he is authorized by the drawee to make.

“The rule that it is not competent for an acceptor to allege as a defense to an action on a bill that it was done without consideration, or for accommodation, as against a *bona fide* holder for value of such paper, flows logically from the conclusive force given to his admission of funds, and is elementary.” — C.

as may be necessary to satisfy the balance of the debt, for the security of which he received it.

Judgment on the verdict for the plaintiff for the smaller sum.<sup>3</sup>

#### IV. Effect of want of consideration.

§ 54

OSGOOD *v.* ARTT.

[Reported herein at p. 307.]

§ 54

STACY *v.* KEMP.

97 MASSACHUSETTS, 166. — 1867.

CONTRACT upon a promissory note. Defense, partial failure of consideration in that plaintiff, having agreed not to peddle milk in H., had continued to do so, etc. The trial court held evidence of this inadmissible. Plaintiff alleges exceptions.

CHAPMAN, J., [after disposing of another question]. It was competent to the defendant to prove that the note was given as well in consideration of a sale of the good will of the milk route, and an agreement not to go into business which should interfere with it. as

<sup>3</sup> In *Mersick v. Alderman*, 77 Conn. 634, 637, the court said: "The defendants claim that the complaint was inappropriate, in that it was in the ordinary form of one on behalf of an indorsee of a negotiable note against the maker, and that the judgment did not conform to the complaint in that it was rendered for the amount of the indebtedness which it was given to secure. It is well settled that the payee or indorsee of a note held as collateral may sue upon it, and such is the plain implication of our statutes. Gen. St. 1902, §§ 4222-4227 [N. Y., §§ 91-96]; *Daniels on Negotiable Instruments*, § 833; *Hodges v. Nash*, 141 Ill. 391; *Whittaker v. Charleston Gas Co.*, 16 W. Va. 717; *Reed v. First National Bank*, 23 Colo. 380. The fact that judgment is not in such cases rendered for the full amount of the note, but for the amount of the indebtedness secured thereby, does not establish that the recovery is not upon the note. True it is that, generally speaking, a holder in due course of negotiable instruments is entitled to recover the full amount thereof. Gen. St. 1902, § 4227 [N. Y., § 96]. But it has long been an accepted principle limiting the operation of the general rule, but not repugnant to it, that one who takes such paper as collateral security for a debt will be limited in his recovery to the amount of that debt. *Cromwell v. County of Sac.*, 96 U. S. 60; *Duncan v. Gilbert*, 29 N. J. Law, 521; *Fisher v. Fisher*, 98 Mass. 303; *Youngs v. Lee*, 12 N. Y. 551. The recovery, however, is none the less upon the paper. The plaintiff was justified in confining his allegations to such as disclosed his right *prima facie* to recover the amount of the note, and in leaving to the defendants to set up in their answer, as they did, the facts which served to limit that right. *Vanview v. Bank*, 21 Ill. App. 126; *Curtis v. Mohr*, 18 Wis. 615; *Duncan v. Gilbert*, 29 N. J. Law, 521. The exceptions to the finding need not be considered." — C.

of a sale of the articles enumerated in the bill of parcels. Agreements of this character are valid, and are often specifically enforced in equity by injunction, and at law by actions for damages. Evidence that the plaintiff has interfered with the route in the manner stated, would tend to show that he has deprived the defendant of a part of the consideration for which the note is given. It was formerly held that such damages must be recovered by a cross-action, and could not be proved and allowed in defense of an action on the note, by way of *recoupment*. But the doctrine of *recoupment* of damages was fully established in this court, in *Harrington v. Stratton*, (23 Pick. 510.) (See *Burnett v. Smith*, 4 Gray, 50.) It has since been applied in numerous cases, and was already well established in New York. It is an equitable set-off of damages which ought to be deducted from the plaintiff's demand, and for the recovery of which the defendant ought not to be turned round to a cross-action. The court are of opinion that it should be applied to a case like the present, where the plaintiff has deprived the defendant of a valuable part of the consideration of the note in suit, if the facts which were alleged shall be proved.

The first exception must be overruled; and the second sustained.\*

## V. Liability of accommodation party.

### § 55 GREENWAY v. WILLIAM D. ORTHWEIN GRAIN CO.

85 FEDERAL REPORTER (CIR. CT. APP., 8TH CIR.) 536. — 1898.

SANBORN, Circuit Judge. On June 27, 1894, for the purpose of enabling Ed. Hogaboom to borrow money upon it, and without consideration, the plaintiff in error, G. C. Greenway, signed, as one of the makers, a promissory note made by Ed. Hogaboom for \$5,000 and interest at 10 per cent. per annum after maturity, payable to the order of Hogaboom.<sup>5</sup> On July 23, 1894, Hogaboom made his promissory note for \$5,000 with interest at 10 per cent. per annum from its date, payable seven months thereafter to the order of the defendant in error, William D. Orthwein Grain Company, a corporation. On that day, Hogaboom indorsed and pledged the four-months note to secure the payment of the seven-months note, delivered them both to the defend-

\* Accord: *Torinus v. Buckham*, 29 Minn. 128; 1 Daniel on Neg. Inst., §§ 201-204. One who is "not a holder in due course" stands in the same relation as an immediate party. Thus a transferee of over-due paper is subject to the defense of failure of consideration. *Bryan v. Primm*, 1 Ill. 33; *Diamond v. Harris*, 33 Tex. 634; *Sawyer v. Hoovey*, 5 La. Ann. 153. — H.

[See also *Hathorn v. Wheelwright*, 99 Me. 351, reported in 2 A. & E. Ann. Cas. 428, with note entitled "Partial failure of consideration as defense to action on bill or note." — C.]

<sup>5</sup> This note was payable four months after date. — C.

ant in error, and borrowed \$5,000 of that corporation upon them. Only \$666.66 has ever been paid upon either note. The grain company sued Greenway on the note which he signed, and his defenses were: (1) That he signed the note without consideration, for the accommodation of Hogaboom, and that the defendant in error was cognizant of this fact when it made the loan to him; \* \* \* the court peremptorily instructed the jury to return a verdict for the defendant in error for the face of the note and interest, less the \$666.66 which had been paid. This instruction is assigned as error. Accommodation paper constitutes a loan of credit, without consideration, by one party to another, who undertakes to pay the paper and indemnify the lender against loss on its account. It is paper which is made, indorsed, or accepted by one party, without consideration, for the accommodation of another, for the purpose and with the intention that the latter shall obtain money or credit upon it of some third party. The accommodated party can maintain no action upon it against the accommodation maker, because the latter has received no consideration for it from him. But, if the party accommodated uses the paper in the ordinary course of business to obtain money, credit, or any other thing of value from a third party, the law imputes the consideration which he receives to the accommodation maker, indorser, or acceptor, because the latter, by placing his name upon the paper, has, in effect, requested him who advances the consideration upon it to pay that consideration to the party accommodated. It was for that very purpose and with that intention that he placed his name upon the paper; and when a stranger has given a valuable consideration for it to the accommodated party in reliance upon this purpose and intent, the accommodation maker cannot be permitted to say that he has not himself received that consideration. It is therefore no defense against one who has acquired accommodation paper, with knowledge of its character, but in good faith, in the ordinary course of business, and for value, that the accommodation maker actually received no consideration for it. *Bank v. Weisiger*, 2 Pet. 347, 348; *Iron Co. v. Brown*, 63 Me. 139; *Tourtlot v. Reed*, 62 Minn. 384; *Rea v. McDonald*, 68 Minn. 187; *Miller v. Larned*, 103 Ill. 562, 571; *Israel v. Ayer*, 2 S. C. 344, 348; *Spurgin v. McPheeters*, 42 Ind. 527. One who takes commercial paper by way of a pledge to secure the repayment of a simultaneous loan made in consideration of the pledge acquires it for value. *Swift v. Tyson*, 16 Pet. 1; *Oates v. Bank*, 100 U. S. 239; *Railroad Co. v. Bank*, 102 U. S. 14, 28. The first defense of the plaintiff in error was therefore without foundation.

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The charge of the court below was right, and the judgment must be affirmed. It is so ordered.<sup>6</sup>

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<sup>6</sup> See *Marling v. Jones*, 138 Wis. 82, *post.* — C.

## § 55 OPPENHEIM v. SIMON REIGEL CIGAR CO.

90 NEW YORK SUPPLEMENT (SUP. CT., APP. T.) 335. — 1904.

ACTIONS on promissory notes. Judgments for plaintiff and defendant appeals.

BISCHOFF, J. The notes in suit were discounted by plaintiff's assignor for the maker, being in the latter's possession with the indorsement of the payee, the appellant corporation. The circumstances imported the fact that the indorsement was for accommodation (*Stall v. Bank*, 18 Wend. 466; *Fielden v. Lahens*, 2 Abb. Dec. 111, 116), and hence not within the powers of a manufacturing corporation, such as this. *Nat. Park Bank v. G. A. Co.*, 116 N. Y. 281. The Negotiable Instruments Law (Laws 1897, p. 719, c. 612) does not affect this question of power. Section 41 provides for the passing of title by indorsement, not the incurring of liability, and section 55 does not refer to corporations; therefore it is not to be implied that the Legislature intended to extend the powers of every corporation to the making of accommodation indorsements. Crawford, Neg. Instruments (2d Ed.) pp. 36, 37. Upon the facts presented, the judgment charging the appellant with liability is without support, but it may be that upon a new trial the plaintiff might produce sufficient proof to bind the corporation upon principles of estoppel. Therefore an absolute dismissal will not be ordered.

Judgments reversed, and new trial ordered, with costs to appellant to abide the event. All concur.<sup>7</sup>

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<sup>7</sup> In *Nat. Bank of Newport v. H. P. Snyder Mfg. Co.*, 117 App. Div. (N. Y.) 370, 373, the court said: "It is to be borne in mind that the defendant in this case is a manufacturing corporation. When an individual signs a note, either as maker or indorser, for the benefit of another, and allows it to be put in circulation, he is liable to a holder for value, although such holder knew him to be an accommodation party. Negotiable Instruments Law. § 55; *National Bank of the City of N. Y. v. Topfritz*, 81 App. Div. 593, affirmed 178 N. Y. 464. But a manufacturing corporation has no power to bind itself as an accommodation party. *Central Bank v. Empire Stone Dressing Co.*, 26 Barb. 23; *Bank of Genesee v. Patchin Bank*, 13 N. Y. 309; *National Park Bank v. German Am. N. W. & S. Co.*, 116 N. Y. 281. So that the rule adverted to [that the burden was upon the defendant to prove that the plaintiff knew or had reason to suspect that the note was accommodation paper when it accepted it] does not obtain in this case, and the plaintiff must show both that it was a holder for value, and also that it did not know the accommodation character of the defendant's signature."

See also *Cook v. Am. Tubing and Webbing Co.*, 28 R. I. 41, reported in 9 L. N. S. 193, with note entitled "Power of corporation to issue accommodation paper." — C.

## § 55 MORRIS COUNTY BRICK CO. v. AUSTIN.

75 ATLANTIC REPORTER (N. J. SUP. CT.) 550. — 1910.

THIS is a suit on a promissory note dated June 9, 1908, made by Virgil to the order of the plaintiff for the purchase price of bricks sold him through Austin, who was entitled to a commission upon the sale. Austin indorsed the note under the following circumstances: Upon his demand for payment of his commission, the plaintiff refused to pay until the bricks were paid for by Virgil, unless Austin would indorse the note. Austin thereupon indorsed the note, and was paid his commission. The note was discounted at the bank, but was not paid at maturity, and Austin's liability was fixed by due notice of dishonor. The trial judge directed a verdict for the plaintiff for the full amount.

SWAYSE, J. \* \* \* It was open to the jury to believe the testimony of the defendant that he indorsed the note to enable the company to get it discounted, and thereby raise cash out of which they would pay his commission. From this it was proper to infer that Austin was an accommodation party (*Vliet v. Eastburn*, 64 N. J. Law, 627), and this is true notwithstanding the language of section 29<sup>8</sup> of the act, which defines an accommodation party as one who has signed the instrument as maker, drawer, acceptor, or indorser, without receiving value therefor. This language has been criticised by Dean Ames, 14 Harvard Law Review, 248; and, if it must be construed to mean that one who loans his name to another upon a negotiable instrument and receives payment for the accommodation loses as to that person the right of an accommodation party, it would be subject to very just criticism, since such a construction would deprive an accommodation maker of his rights, as against the person accommodated, if he had received any consideration, however slight. A careful reading of the section shows that this construction is not necessary. The words are not "without receiving value," but "without receiving value therefor." The structure of the sentence is such that the last word can only refer to the negotiable instrument itself, not to the loan of the name by way of accommodation. This view was suggested by Mr. McKeehan in 41 American Law Register, 499, 561 (reprinted in Brannan on the Negotiable Instruments Act, at page 133). In this case, moreover, Austin did not receive value in any sense. What he secured was the payment out of the proceeds of the discounted note of the commission due him. That was only the payment of a prior debt, not the giving of value for Austin's indorsement. The value received within the meaning of section 29 must precede or be contemporaneous with the obligation upon the note; otherwise, the party would be an accommodation party when the note was given and

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8 N. Y., § 55. — C.



would cease to be such when the subsequent payment was made him. Nor can the promise to pay the commission out of the proceeds of the note as distinct from the actual payment constitute value for the endorsement, for that promise was merely one to perform an existing legal obligation, and was therefore without consideration. If the jury found that Austin was an accommodation party, they would necessarily find that the plaintiff was the party accommodated, for no one else was concerned. The maker had nothing to do with the arrangement. If Austin loaned his name to the plaintiff corporation, it acquired no right of action against him. *Messmore v. Meyer*, 56 N. J. Law, 31. \* \* \*

A jury question was presented, and it was error to direct a verdict for the plaintiff. The judgment must therefore be reversed, and the record remitted for a new trial. \* \* \*

## ARTICLE IV.

### NEGOTIATION.

#### I. What constitutes negotiation or transfer.

§ 60 CROUCH *v.* CREDIT FONCIER, L. R. 8 Q. B. 374. (1873.)

BLACKBURN, J. — In the present case the plaintiff has taken upon himself the burden of establishing both that the property in the debenture passed to him by delivery, and that the right to sue in his own name was transferred to him.

The two propositions are very much connected, but not identical. The holder of an overdue bill or note may confer the right on the transferee to sue in his own name, but he conveys no better title than he had himself. \* \* \*

But the two questions go very much together; and, indeed, in the notes to *Miller v. Race* (1 Smith, L. C. 9th ed., p. 491), where all the authorities are collected, the very learned author says: "It may therefore be laid down as a safe rule that where an instrument is by the custom of trade transferable, like cash, by delivery, and is also capable of being sued upon by the person holding it *pro tempore*, then it is entitled to the name of a *negotiable instrument*, and the property in it passes to a *bona fide* transferee for value, though the transfer may not have taken place in market overt. But that if either of the above requisites be wanting, *i. e.*, if it be either not accustomably transferable, or, though it be accustomably transferable, yet, if its nature be such as to render it incapable of being put in suit by the party holding it *pro tempore*, it is not a *negotiable instrument*, nor will delivery of it pass the property of it to a vendee, however *bona fide*, if the transferor himself have not a good title to it, and the transfer be made out of market overt."

Bills of exchange and promissory notes, whether payable to order or to bearer, are by the law merchant negotiable in both senses of the word. The person who, by a genuine indorsement, or, where it is payable to bearer, by a delivery, becomes holder, may sue in his own name on the contract, and if he is a *bona fide* holder for value, he has a good title notwithstanding any defect of title in the party (whether indorser or deliverer) from whom he took it.<sup>1</sup>

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<sup>1</sup> For a luminous discussion of "negotiability," see Willis on Negotiable Securities (1896), Lectures I and II. — H.

## I. TRANSFER BY DELIVERY.

## § 60

BITZER *v.* WAGER.

83 MICHIGAN, 223. — 1890.

ACTION on the following promissory note:

\$100.00.

HART, MICH., *March* 20, 1889.

Eight months after date I promise to pay to the order of Marget A. Bitzer (or bearer), one hundred dollars, at the Oceana County Savings Bank, value received, with interest at the rate of 6 per cent.

BERT SPELLMAN.

G. L. WAGAR.

Judgment for plaintiff. Defendant brings error on the ground that the court erred in admitting in evidence the note in question for the reason (a) that the note is payable to Margaret A. Bitzer, and has never been indorsed or transferred by her to plaintiff; (b) that said note is not competent evidence, for the reason that plaintiff has not shown that he owns or has property in said note.

LONG, J., [after disposing of another matter]. — The note is plainly payable to bearer, and suit could be maintained thereon in the name of any holder.

Judgment affirmed.<sup>2</sup>

## § 60

COCK *v.* FELLOWS.

1 JOHNSON (N. Y.) 143. — 1806.

FROM the return to the *certiorari* in this cause, it appeared that an action had been brought by the defendant in error against the present plaintiff, before a justice of the peace, in which he declared on a writing or note, in the following words:

Due the bearer hereof, 3l, 18s, 10d. which I promise to pay to Abraham Thompson, or order, on demand, as witness my hand, this 22d, 11th month, 1803.

[Signed] JORDAN COCK.

The note was not endorsed by Thompson, and the declaration stated the note was made payable to the bearer. The justice gave judgment for the plaintiff below, for the amount of the note.

PER CURIAM. The word *bearer* has reference to Thompson as the

<sup>2</sup> Accord: *Grant v. Vaughan*, 3 Burr. 1516; *Pierce v. Crafts*, 12 Johns. (N. Y.) 90; *Ellis v. Wheeler*, 3 Pick. (Mass.) 18; *Matthews v. Hall*, 1 Vt. 316. In Illinois promissory notes payable "to A. or bearer" require indorsement, though not if payable "to bearer." *Roosa v. Crist*, 17 Ill. 450; *Garfield v. Berry*, 5 Ill. App. 355; cf. *Avery v. Latimer*, 14 Oh. 542.

For meaning of "instruments payable to bearer," see § 28, *ante*.

As to effect of special indorsement see *Johnson v. Mitchell*, 50 Tex. 212, *post*. — H.

payee, and as the promise is expressly to pay him or order, another person could not maintain an action on the note without his endorsement. The judgment below must be reversed.

Judgment reversed.

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## 2. TRANSFER BY INDORSEMENT AND DELIVERY.

### (a) *Transfer by indorsing assignment.*

#### § 60

#### MARKEY v. COREY.

108 MICHIGAN, 184. — 1895.<sup>3</sup>

ACTION against Corey as indorser. The indorsement read: "I hereby assign the within note to Matthew M. Markey and Catherine Sundars." The note also referred to a certain contract which provided that in case of default in any one of five notes (of which the note in suit was one), all of the notes, at the option of the payee, might be declared due and payable.<sup>4</sup> Judgment for plaintiff.

LONG, J., [after stating the facts]. — The usual mode of transfer of a promissory note is by simply writing the indorser's name upon the back, or by writing also over it the direction to pay the indorsee named, or order, or to him or bearer. An indorsement, however, may be made in more enlarged terms, and the indorser be held liable as such. In *Sands v. Wood* (1 Iowa, 263), the indorsement was, "I assign the within note to Mrs. Sarah Coffin." In *Sears v. Lantz* (47 Iowa, 658), the indorsement on the note was, "I hereby assign all my right and title to Louis Meckley." And in each case the party so assigning was held as indorser; the court in the latter case saying of *Sands v. Wood*: "He used no words that, in and of themselves, indicated that he had bound or made himself liable in case the maker, after demand, failed to pay the note. But it was held the law, as a legal conclusion, attached to the words used the liability that follows the indorsement of a promissory note." (See, also, *Duffy's Adm'r v. O'Connor* 7 Baxt. 498; *Selby v. Judd*, 24 Kan. 166; *Brotherton v. Street* [Ind. Sup.], 24 N. E. 1068.) The rule of the American cases is well stated in Daniel on Neg. Inst., (§ 688c), as follows: "The question arising in such cases, is a nice one, and depends upon rules of legal interpretation. The mere signature of the payee, indorsed on the paper, imports an executed contract of assignment, with its implications, and also an executory contract of conditional liability, with its

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<sup>3</sup> Reported in 36 L. R. A. 117, with note entitled "Assignor of promissory note as an indorser." — C.

<sup>4</sup> Neg. Inst. L., § 21, subsec. 3. — H.

implications.<sup>5</sup> The assignment would be as complete by the mere signature as with the words of assignment written over it. The conditional liability which is executory is implied by the executed contract of assignment, and the signature under it, which carried the legal title; and the question is, does the writing over a signature an express assignment, which the law imports from the signature *per se*, exclude and negative the idea of conditional liability, which the law also imports if such assignment were not expressed in full? We think not. When the thing done creates an implication of another to be done, we cannot think that the mere expression of the former in full can be regarded as excluding its consequence, when that consequence would follow if the expression were omitted."

The language used in the assignment to the note in suit does not negative the implication of the legal liability of the assignor as indorser, and as the words are to be construed, as strongly as their sense will allow, against the assignor, he must be held as indorser. This rule is fully supported in *Hatch v. Barrett* (34 Kan. 230; 8 Pac. 129). (See, also, *Adams v. Blethen*, 66 Me. 19.) In the case of *Aniba v. Yeomans* (39 Mich. 171), the assignment read as follows: "I hereby transfer my right, title, and interest of the within note to S. A. Yeomans." Mr. Justice Marston said in that case: "The right or interest passing, therefore, under the usual and customary indorsement, is much greater than the mere right, title, and interest of the payee; and when the transfer, as made, only attempts to pass the title and interest of the payee of the note, no greater right or interest than he then held can pass." In other words, the learned justice seemed to think that the words used limited the transfer to the right and title he then held. While this holding appears to be at variance with the cases elsewhere, we think it readily distinguishable from the present, as here the words are, "I hereby assign the within note to Matthew M. Markey and Catherine Sundars" and do not purport to limit the liability of Corey as an indorser. In *Stevens v. Hannan* (86 Mich. 307), the note sued upon was negotiable in form, and made payable to Batchelder, and he assigned it before maturity, as follows: "For value received, I hereby assign all interest in and to this note to Ralph E. Watson." Defendant insisted in that case that the plaintiff could not sue in his own name, but should have sued in the name of the payee. It was said by Mr. Justice McGrath: "I do not think the point well taken. If Batchelder's indorsement did not affect its negotiability, then Watson's indorsement entitled the plaintiff, as holder of the note, to sue in his own name." It must be held, therefore, that the memorandum on the note did not relieve Corey from his liability as indorser.

The court was not in error in admitting the contract in evidence,

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<sup>5</sup> See Neg. Inst. L., § 116, *post*. — H.

as its purpose was to show that the note was not in fact limited by its provisions, and those provisions of the contract cited did not destroy the negotiability of the note. (Daniel, Neg. Inst., § 48.)

The judgment must be affirmed. The other justices concurred.<sup>6</sup>

§ 60 HALL v. TOBY, 110 Pennsylvania State, 318. — 1885.

Action by D. B. Toby as indorsee under the following instrument and assignment:

\$551.50.

WARREN, Aug. 18, 1879.

For value received I promise to pay Wm. Toby, or order, five hundred and fifty-one 50/100 dollars with interest.

ORRIS HALL.

[On the back of this paper was the following transfer or assignment]:

For value received I hereby assign, transfer and set over to D. B. Toby all my right, title, interest and claim in the within note.

WM. TOBY,  
D. B. TOBY.

TIONESTA, Nov. 21, 1881.

PER CURIAM. — This note was negotiable. It contained an absolute and unconditional promise to pay to Wm. Toby or order the sum specified. As no time of payment was therein expressed, the law adjudges the money to be payable immediately. A right of action accrued at once and would be barred by the Statute of Limitations at the expiration of six years thereafter. The note had all the essential language to constitute a promissory note.

The legal right of action thereon would have passed by indorsement and delivery. For purpose of transfer the assignment on the back of this note passed the legal title.<sup>7</sup>

(b) *Transfer by indorsing guaranty.*

§ 60 TRUST COMPANY v. NATIONAL BANK.

101 UNITED STATES, 68. — 1879.

BILL to compel surrender of note. The note with security was given by the Wyandotte Bank to the Cook County National Bank to obtain credit, and not to be negotiated. The latter did negotiate it to the Trust Company. At its maturity there was due on it to the

<sup>6</sup> Accord: *Maine Trust, etc., Co. v. Butler*, 45 Minn. 506; *Davidson v. Powell*, 114 N. C. 575; *Merrill v. Hurley*, 6 So. Dak. 592.

Contra: *Lyons v. Divelbis*, 22 Pa. St. 185; *Spencer v. Halpern*, 62 Ark. 595; *Cf. Aniba v. Yeomans*, 39 Mich. 171. — H.

<sup>7</sup> *Cf. Aniba v. Yeomans*, 39 Mich. 171. While the indorsement passes title it does not make the "assignor" liable as an indorser. *Lyons v. Divelbis*, 22 Pa. St. 185. Contra: *Henderson v. Ackelmire*, 59 Ind. 540; *Adams v. Blethen*, 66 Me. 19. — H.

Cook County National Bank \$132, which the Wyandotte Bank offers to pay.

MR. JUSTICE STRONG [after stating the facts]. — The note was not indorsed to the Trust Company, and it was not, therefore, taken in the the usual course of business by that mode of transfer in which negotiable paper is usually transferred. Had it been indorsed by the Cook County Bank, it may be that the Trust Company would hold it unaffected by any equities between the maker and payee. But instead of an indorsement, the president of the Cook County Bank merely guaranteed its payment, and handed it over with this guaranty to the Trust Company. The note was not even assigned. There was written upon it only the following: —

For value received, we hereby guarantee the payment of the within note at maturity, or at any time thereafter, with interest at ten per cent. per annum until paid, and agree to pay all costs and expenses paid or incurred in collecting the same.

B. F. ALLEN, Pres't.

In no commercial sense is this an indorsement, and probably it was not intended as such. Allen had agreed that the note should not be negotiated, and for this reason perhaps it was not indorsed. That a guaranty is not a negotiation of a bill or note as understood by the law merchant, is certain. (*Snevily v. Ekel*, 1 Watts & S. [Pa.], 203; *Lamourieux v. Hewitt*, 5 Wend. [N. Y.], 307; *Miller v. Gaston*, 2 Hill [N. Y.], 188). In this case, the guaranty written on the note was filled up. It expressed fully the contract between the Cook County Bank and the Trust Company. Being express, it can raise no application of any other contract. *Expressum facit cessare tacitum*. The contract cannot, therefore, be converted into an indorsement or an assignment. And if it could be treated as an assignment of the note, it would not cut off the defenses of the maker. Such an effect results only from a transfer according to the law merchant; that is, from an indorsement. An assignee stands in the place of his assignor, and takes simply an assignor's rights; but an indorsement creates a new and collateral contract. (2 Parsons, Notes and Bills, 46 *et seq.*, notes.)

At best, therefore, the defendants below can claim no more or greater rights than those of the Cook County Bank, and the complainants are entitled to a return of the note and of the collaterals on payment of the sum of \$132.

Decree affirmed.<sup>8</sup>

<sup>8</sup> Accord: *Tuttle v. Bartholomew*, 12 Met. (Mass.) 452; *Belcher v. Smith*, 7 Cush. (Mass.) 482; *Canfield v. Vaughan*, 8 Mart. (La.) 683.

Contra: *Myrick v. Hasey*, 27 Me. 9; *Heard v. Dubuque Bank*, 8 Neb. 10; *Helmer v. Bank*, 28 Neb. 474; *Kellogg v. Douglas Co. Bank*, 58 Kan. 43; *Dunham v. Peterson*, 5 N. Dak. 414, where the question is fully discussed and authorities collected; *Elgin City Banking Co. v. Zelch*, 57 Minn. 487, *infra*. — H.

## § 60 ELGIN CITY BANKING CO. v. ZELCH.

57 MINNESOTA, 487. — 1894.

ACTION by indorsee against maker. The question was whether plaintiff was an indorsee, or an assignee and so subject to the defense of fraud or failure of consideration. The court directed a verdict for plaintiff. The facts appear in the opinion.

MITCHELL, J. — The defendant executed his negotiable promissory note, payable to the order of one Daniel Dunham, who transferred it to the plaintiff, with the following indorsements: "Pay the Elgin City Banking Co. D. Dunham." "Payment Guaranteed. D. Dunham."

Whether these indorsements be construed as constituting a single contract, or two distinct and separate contracts, we are clear that they constitute an "indorsement," in the commercial sense, and that the transferee is an "indorsee," and entitled to protection as such, under the law merchant. The fact that Dunham enlarged his responsibility beyond that of "indorser," by guarantying payment, did not change or affect the character of his indorsement.

Order affirmed.<sup>9</sup>

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<sup>9</sup> See note 1, above. "A guaranty of the payment of a note does not necessarily include a contract of indorsement, but when such guaranty is written upon the back of the note in general terms and signed by the payee named therein, the universal custom is to treat such contract of guaranty as a transfer of the title of the payee to the person to whom the guaranty is made." *National Bank of Commerce v. Galland*, 14 Wash. 502, 505. Such a guaranty constitutes "an indorsement of the note with an enlarged liability." *Donnerberg v. Oppenheimer*, 15 Wash. 290. "I guarantee attorney's fees up to 10 per cent. if this note has to be collected by law, and its prompt payment," — held an indorsement by the payee with an enlarged liability. *Pattillo v. Alexander*, 96 Ga. 60. For a distinction between the case where the guaranty is executed by the payee and where it is executed by a third person, see *Vanzant v. Arnold*, 31 Ga. 210; *Geiser Mfg. Co. v. Jones*, 90 Ga. 307. See title "Guarantor's Liability," *post*, Art. VI, Div. VII.

DELIVERY. — "It has often been decided, that the assignment [transfer] of a note is not complete without a delivery, and that where a promissory note is found in the hands of one who has made an indorsement thereon, which, if accompanied by delivery, would have amounted to an assignment [transfer], the presumption will be that the assignment was never completed, and that he may, even after suit brought, strike out such indorsement." *Wulschner v. Sells*, 87 Ind. 71, 74. Accord: *Spencer v. Carstarphen*, 15 Colo. 445.

NON-NEGOTIABLE INSTRUMENT. — The indorsement and delivery of a non-negotiable note does not (independent of statute) authorize the holder to bring an action in his own name, and the holder is subject to all defenses that might have been set up against his transferor. *Robinson v. Brown*, 4 Blackf. (Ind.) 128; *Maule v. Crawford*, 14 Hun (N. Y.) 193; *post*, Art. XVII, Div. I, 3. — H.



## § 60

JOHNSON *v.* MITCHELL.

[Reported herein at p. 289.]

## § 60

BROWN *v.* CURTISS.

[Reported herein at p. 467.]

## II. Indorsement: form required.

## I. MUST BE WRITTEN ON INSTRUMENT OR ALLONGE.

## § 61

HERRING *v.* WOODHULL.

29 ILLINOIS, 92. — 1862.

BREESE, J. — The first point made in this case is, that the note was not properly indorsed, the transfer being on the face of the note. Literally, indorsement means a writing, *in dorse*, upon the back of the bill or note. But it is well established, that though such is its import, it may be on the face of the bill,<sup>1</sup> and numerous indorsements may be made on a separate paper, called an *allonge*. (Chit. on Bills, 227; *Yarborough v. Bank of England*, 16 East, 12; *Rex v. Bigg*, 1 Strange, 18; Story on Prom. Notes, § 121; *Gibson v. Powell*, 6 Howard [Miss.] 60.) And any form is sufficient which manifests an intention to transfer the note. (*Morris v. Bird*, 11 Mass. 436.)<sup>2</sup>

## § 61

FOLGER *v.* CHASE.

18 PICKERING (MASS.) 63. — 1836.

ACTION on three promissory notes.

WILDE, J., delivered the opinion of the Court. \* \* \*

The last objection is, that the indorsement on one of the notes was not made on the back of the original note, and therefore amounted only to an equitable transfer. The indorsement was made on a paper attached to the back of the note by a wafer, and it had been before thus attached for the purpose of entering thereon indorsements of payments, the back of the original note having been before covered with indorsements; and several payments had been indorsed on the attached paper,

<sup>1</sup> Accord: *Young v. Glover*, 3 Jur. N. S. 637; *Haines v. Dubois*, 30 N. J. L. 259; *Shain v. Sullivan*, 106 Cal. 208. See Neg. Inst. L., § 36, subsec. 6. — H.

<sup>2</sup> See *Germania Nat. Bank v. Mariner*, 129 Wis. 544, ante, p. —. — C.

before the note was transferred by indorsement to the plaintiff. This paper thus attached had become a part of the note, and no good reason can be given why an indorsement made thereon should not be held a valid and legal transfer. The objection is, that such an indorsement is not sanctioned by custom; but we think it is supported by the reasons on which the custom was originally founded. Bills of exchange and promissory notes were indorsed on the back of the bills and notes, because it was a convenient mode of making the transfer, and in order that the evidence thereof might accompany the note. Such an indorsement as this will rarely happen, and no authority to support it could reasonably be expected; but there is no authority against it.

If a person write his name on a blank paper, to be used as an indorsement of a note to be written on the other side, and it be filled up as intended, the party would be held liable as indorser of the note, although such indorsements are infrequent, and are not according to the customary form of making a transfer; but they have been held to be within the reason of the custom, and are supported by principle. (*Bayley on Bills*, 92; *Violett v. Patton*, 5 Cranch. 142.)<sup>3</sup>

So in the present case, as there is no authority against the validity of the indorsement, we think we shall violate no principle in holding it to be a legal transfer of the note.

Judgment for the plaintiffs.

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## 2. MUST BE OF ENTIRE INSTRUMENT.

### § 62

#### HUGHES *v.* KIDDELL.

2 BAY (SO. CAR.), 324. — 1801.

THIS was an action against defendant as indorser on a note of hand, in which there was a verdict for defendant. The note of hand in question was given by David Bush, of Camden, to the defendant Kiddell, for 473*l.* sterling. Kiddell afterwards made the following indorsement, viz: —

“I assign over to Hudson Hughes, the sum of 1,930 dollars and 50 cents, as part of this note of hand.

(Signed.)

Benjamin Kiddell.”

Afterwards he made another indorsement, and assigned over the residue of said note [to Hughes.] (Signed) Benjamin Kiddell.

The court, after hearing the arguments,<sup>4</sup> refused to grant a new trial, on the ground that an indorsement for part of a note or bill is

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<sup>3</sup> See *Neg. Inst. L.*, § 33, *ante*. — H.

<sup>4</sup> Counsel for defendant argued that “if it were allowable for a man to indorse for part, he might indorse one hundred to A, another hundred to B, and so on; and by that means, defendant might become liable to twenty dif-

bad. (*Lex Mercatoria*, 445 *Carth.* 466.) And if so, then two vitious indorsements can never constitute a good one.

Rule discharged.

### III. Indorsement: kinds of.

#### I. SPECIAL INDORSEMENT.

§ 64

REAMER *v.* BELL.

79 PENNSYLVANIA STATE, 292. — 1875.

ACTION by holder against makers of a note payable "to the order of William Dilworth, Jr.," and indorsed: "Wm. Dilworth, Jr.—Pay R. McCurdy, Cash." Defense, want of title in holder (Bell). Judgment for plaintiff.

MR. JUSTICE PAXSON delivered the opinion of the Court.

We think the affidavit of defense filed in this case, while not as specific as it might have been, was nevertheless sufficient to prevent judgment. The copy of the note filed by the plaintiff below goes to sustain the denial of his title contained in the affidavit referred to. It is indorsed "Wm. Dilworth, Jr.; pay R. McCurdy, Cash." This is a special indorsement, and upon its face conveys no title to the plaintiff below.

The further allegation that the note in controversy was procured by false and fraudulent representations, and that the consideration thereof has failed, coupled with the denial of said plaintiff's title, was sufficient to put the latter upon proof that he is a *bona fide* holder.<sup>5</sup>

Judgment reversed and a *procedendo* awarded.<sup>6</sup>

#### 2. BLANK INDORSEMENT.

§ 64

CURTIS *v.* SPRAGUE.

[*Reported herein at p. 144.*]<sup>7</sup>

§ 65 EVANS *v.* GEE, 11 Peters (U. S.) 80.—1837. Bill payable "to the order of Thomas Evans" was indorsed in blank by payee (defend-

ferent actions on the same bill. For these reasons, and to guard against this monstrous inconvenience, the law of merchants has established it as a rule, that a bill cannot be endorsed for part. *Cunn. on Bills*, 57."

To the same effect, see *Lindsay v. Price*, 23 Tex. 280, bottom of p. 282. — C.

<sup>5</sup> See *Neg. Inst. L.*, § 98, *post*. — H.

<sup>6</sup> See also *Lawrence v. Fussell*, 77 Pa. St. 460. — H.

<sup>7</sup> "I see no difference between a note indorsed in blank and one payable to bearer. They both go by delivery, and possession proves property in both cases." Lord Mansfield in *Peacock v. Rhodes*, 2 Doug. 633. — H.

ant). Plaintiff became a holder in due course and wrote over the indorsement, "Pay to Sterling H. Gee." MR. JUSTICE WAYNE:—As regards the right of a *bona fide* holder of a bill to write over a blank indorsement to whom the bill shall be paid, at any time before or after the institution of a suit against the indorser, it has long been the settled doctrine in the English and American courts; and the holder by writing such direction over a blank indorsement, ordering the money to be paid to particular persons, does not become an indorser. (*Eden v. East India Co.*, 2 Burr. 1216; Com. 311; Str. 557; *Vincent v. Halock*, 1 Camp. 6; *Smith v. Clarke*, Peake, 225.)<sup>8</sup>

## § 65

## BELDEN v. HANN.

61 IOWA, 42. — 1883.

QUESTION certified by Circuit Court: Whether a holder of a note under a blank indorsement may write above the indorsement "guarantee payment at maturity to bearer," and proceed against the indorser upon the guaranty without presentment, demand and notice.

ROTHROCK, J. \* \* \* It is well understood that the blank indorsement of a promissory note by the payee creates the liability of an indorser as understood in the law merchant. Such indorsement creates the same liability from the indorser to the indorsee, as if it were in full. (*Bean v. Briggs & Felthouser*, 1 Iowa, 488.)

But the contract of indorsement is very different from a contract of guaranty, and the holder of a note with a blank indorsement by the payee has no legal right to change the obligation of the indorser, by writing a contract of guaranty over the name of the payee, "without the knowledge or consent of the payee."

What the rights of the parties may be to show by parol the real contract entered into by the indorser, need not be considered here, because no such question is certified to us. We are required to determine the questions certified, and not questions of fact or law in the case which are not certified, and we cannot consider the question as to the rights of the parties upon a guaranty upon a chattel mortgage given to secure this note, as we are requested to do by counsel. Taking these questions as they are certified, we answer, unhesitatingly,

<sup>8</sup> Accord: *Lovell v. Evertson*, 11 Johns. (N. Y.) 52. While it is proper, it is not necessary, for a holder to fill up the indorsement before bringing an action or offering the note in evidence. *Rich v. Starbuck*, 51 Ind. 87; *Greenough v. Smead*, 3 Oh. St. 415; *Palmer v. Nassau Bank*, 78 Ill. 380. Contra: *Day v. Lyon*, 6 Harris & Johns. (Md.) 140; *Peaslee v. Robbins*, 3 Met. (Mass.) 164. — H.

as did the court below, that the guaranty written over defendant's name, without his knowledge or consent, was void.

Affirmed.<sup>9</sup>

## § 65

### SCOTT v. CALKIN.

139 MASSACHUSETTS, 529. — 1885.

ACTION against Calkin as maker and Cherrington as subsequent guarantor of a note. Cherrington's name was in blank on the back of the note and she defended on the ground that she had received no notice of dishonor. Calkin made and delivered the note, secured by mortgage, to Pierce and the latter indorsed it to plaintiff. Calkin then sold the real estate covered by the mortgage to Cherrington who assumed and agreed to pay the mortgage debt. In consideration of plaintiff's forbearance to foreclose the mortgage Cherrington agreed with him to pay the note and signed her name on it. She now pleads (1) want of notice as indorser; (2) statute of frauds as guarantor.<sup>1</sup> Plaintiff was permitted to write above C's name, "I guarantee the payment of the within note," and had judgment.

W. ALLEN, J.—The indorsement of the note by the defendant Cherrington, under the circumstances proved, imported a guaranty of the payment of the note to the plaintiff, and gave him authority to write, over her name, the contract implied by law; and this, if necessary at all, could be done during the trial. (*Josselyn v. Ames*, 3 Mass. 274; *Tenney v. Prince*, 4 Pick. 385.)<sup>2</sup>

The finding of the court renders immaterial the question whether demand and notice were necessary.

Judgment for the plaintiff.

## § 65

### CLARKE v. PATRICK.

60 MINNESOTA, 269. — 1895.

CANTY, J.—This is an action against the defendant as indorser of a negotiable promissory note. The answer admits the making of the note to defendant, and the indorsement of it by him to plaintiff for a valuable consideration before maturity, as alleged in the complaint; but alleges that the transaction between the parties was a sale by defendant to plaintiff of the note and a mortgage securing the

<sup>9</sup> The holder cannot enlarge the liability of the indorser. *Hood v. Robbins*, 98 Ala. 484. — H.

<sup>1</sup> The consideration need not be expressed in a contract of guaranty. *Mass. Pub. St.*, c. 78, § 2. — H.

<sup>2</sup> See *Kistner v. Peters*, 223 Ill. 607. — C.

same, which was evidenced by a written assignment, and that said indorsement was not intended by the parties as a guaranty of payment of the note, but was made merely in aid of said assignment. Such written assignment is not inconsistent with defendant's liability as indorser, and it is well settled that the legal effect of an indorsement cannot be thus varied by parol.<sup>3</sup> The answer states no defense, and judgment on the pleadings was properly ordered for plaintiff.

The judgment appealed from is affirmed.<sup>4</sup>

### 3. RESTRICTIVE INDORSEMENT.

§ 66

POWER *v.* FINNIE.

4 CALL (VA.) 411. — 1797.

ACTION by Power against drawer (Finnie) and payee-indorser (Tabb) upon a bill indorsed by Tabb in these words: "Pay the within contents to Jack Power only." There is a good defense (of which evidence is offered and received against plaintiff's objection), unless plaintiff is a *bona fide* holder for value. Judgment for defendant. Plaintiff appeals.

ROANE, JUDGE. — In the case of a negotiable bill no consideration is necessary to be proved, and the indorsee is not affected by the want of it. But a negotiable bill may be restrained by special indorsement, as was decided in the case of *Ancher v. The Bank* (Doug. 615); and, in questions upon such restrictions, the intent must be collected from the face of the indorsement only. An absolute indorsement imports, upon the face of it, a valuable consideration received, and that the payee has transferred his right; after which receipt and sale, he can have no pretense for limiting the indorsement, as it must be immaterial to him, to whom it is paid. But a limited indorsement is a presumptive evidence that the indorsee is agent only; otherwise it would be his interest not to accept of it in that form, as it would impede the future transfer of the bill.

Therefore, whenever such a prohibition appears, it may, I think, be inferred, that the indorsement was not intended to be absolute. If the transfer to Power had, in fact, been absolute, his interest

<sup>3</sup> This does not apply to "irregular indorsements." *Peterson v. Russell*, 62 Minn. 220. See Neg. Inst. L., §§ 113, 114. — H.

<sup>4</sup> Whether a blank indorsement is a written contract and so not to be varied by parol, or evidence of a contract not yet reduced to writing and so subject to establishment by parol, is open to dispute. 1 Daniel on Neg. Inst., §§ 717-723. See *post*, p. 485, note. — H. [See *Johnston v. Schnabaum*, 86 Ark. 82, reported in 17 L. N. S. 838 with note entitled "Right to show by parol that indorsement unrestricted in form was made for purposes of collection only." — C.]

would have prompted him to object to the words restricting the negotiability, when the restriction would have tended to lessen the value of the bill. The presumption, therefore, is fair, that no consideration was paid for it: but that presumption might have been repelled by proving a consideration actually paid. That, however, was not done; and, therefore, I infer that Power was an agent only, and not a purchaser. I think, therefore, that the evidence was proper.

FLEMING, JUDGE. — “On the present occasion, the indorsement is to Jack Power or his order *only*; which furnishes a strong presumption that he was but an agent, and paid no consideration for the bill, as there is no evidence to the contrary.”

CARRINGTON, JUDGE. — “Something must have been meant by this indorsement so out of the common way. It affords a very strong presumption that the endorsee was an agent only.”

PENDLETON, PRESIDENT. — “The word *only* which is not commonly used, could have been used for no other purpose than to restrict the negotiability of the bill, and make Power an agent.”

Judgment affirmed.<sup>5</sup>

## § 66

### LEAVITT v. PUTNAM.

3 NEW YORK, 494. — 1850.

HURLBUT, J. — On the 29th day of August, 1844, Messrs. J. W. & R. Leavitt made their note for \$1,570.52, payable to the order of T. Putnam & Co. (the defendants), eight months after date. A few days after the maturity of the note the defendants indorsed it as follows: “Pay the within to A. Thacher, value received, May 21, 1845. T. Putnam & Co.” Thacher indorsed without recourse, and delivered the note for a valuable consideration to the American Exchange Bank, in whose behalf this action is brought.

On the trial the defendants urged, among other grounds of objection to the plaintiffs’ recovery, that the defendants’ indorsement was

<sup>5</sup> “If the words ‘to A. B. only’ were inserted, I should think it would not be restrictive; at least it should be left to the jury . . . Where a man says ‘pay to A.’ the law says it is ‘to A. or order.’ He then says, I intend it should not be so. What signifies what you intend. The law intends otherwise.” DENISON, J., in *Edie v. East India Co.*, 1 Wm. Bl. 295.

“Whether this indorsement is only an authority to A. B. to receive the money for the use of the indorser, or for his own use, if made for value received, or whether in this last case the restriction is not void, and A. B. may further negotiate it, seems not to be settled. If the property of the note be vested in A. B., perhaps he will hold it with its negotiable quality, notwithstanding the restriction. But of this we give no opinion.” PARSONS, C. J., in *Rice v. Stearns*, 3 Mass. 225, *post*. — H.

in effect a new draft payable to Thacher only, and not negotiable, so that no action could be maintained upon it in the name of the plaintiff. In this they were sustained by the court, and the plaintiff was nonsuited.

The other objections taken by the defendants on their motion for a nonsuit were not considered by the court below, and under the circumstances of the case cannot be noticed on this appeal; so that the only thing for us to consider is, whether the indorsement of a note made after due, differs from one made before maturity in respect to its negotiability? <sup>6</sup>

It was conceded on the argument that no express authority could be found sustaining the distinction upon which the decision of the superior court was based; but it was urged that the defense could be sustained upon the principle that a dishonored note loses its mercantile character, and its indorsement becomes an original contract which must be made expressly negotiable in terms, or it could not be held to possess the character of negotiability. There is unquestionably a difference between the indorsement of a note after due and one while it is running to maturity, but this relates only to a single point arising from the necessity of the case, to wit, the time of payment, which, in the latter indorsement, is fixed at a future day by the express agreement of the parties, while in the former, it is declared by law to be within a reasonable time, upon demand. But in all other respects the contract is the same as an indorsement in the usual course of trade; and it is difficult to perceive how the single difference referred to can at all affect the negotiability of the indorsement. A bill or note does not lose its negotiable character by being dishonored. If originally negotiable, it may still pass from hand to hand *ad infinitum* until paid by the drawer. Moreover, the indorser after maturity writes in the same form and is bound only upon the same condition of demand upon the drawer and notice of non-payment as any other indorser. Thus the paper preserves its mercantile existence and retains the main attributes of a proper bill or note, and circulates as such in the commercial community.

Exceptions to a general rule affecting so important and numerous a class of transactions as the one under consideration must be productive of great inconvenience, and will not be indulged except for urgent reasons; and nothing has been made to appear in the argument or seems to exist in the case, which warrants the court in treating the ordinary indorsement of a dishonored bill or note as without the law merchant and not negotiable. While it was questioned whether such a note was negotiable, and whether the indorser was chargeable except upon the usual condition of demand and

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<sup>6</sup> See Neg. Inst. L., § 26, *ante*, and cases. — H.



notice, there was perhaps reason enough to sustain the decision of the court below. But since both the note and its indorsement, by a long course of decisions, have been treated as within the law merchant in respect to their main attributes, the indorsement ought to be regarded as negotiable to the same extent as an indorsement before maturity. The latter follows the nature of the original bill and is equally negotiable. (*Edie v. East India Co.*, 2 Burr. 1216; *Milford v. Walcott*, 1 Ld. Raym. 574; *Allwood v. Hazelton*, 2 Bailey's S. C. R. 457; *Bishop v. Dexter*, 2 Conn. R 419; *Berry v. Robinson*, 9 John. 121.)

The note in the present case was upon its face transferable, and its character in respect to negotiability could only have been changed by an indorsement containing express words of restriction. The defendant's indorsement was a full one, containing the name of the person in whose favor it was made, but omitting the words "or order," the legal effect of which was, nevertheless, to make the note payable to him or his order, and his indorsement therefore was effectual to transfer the note to the plaintiff. (*Chitty on Bills*, 136; *Story on Prom. Notes*, § 139.)

I am of opinion that the judgment of the superior court should be reversed, and a new trial awarded.

Judgment reversed.

## § 66 CENTRAL RAILROAD *v.* FIRST NATIONAL BANK OF LYNCHBURG.

73 GEORGIA, 383. — 1884.

BLANDFORD, JUSTICE. — The defendant in error brought its action for money had and received, against the plaintiff in error, alleging that plaintiff in error had received from one Mayer and Glauber a sum of money due on a draft of which the following is a copy:

\$276.85.

LYNCHBURG, VA., Feb. 17, 1881.

Sixty days after date, pay to the order of Allen W. Tally, Cashier, two hundred and seventy-six dollars and eighty-five cents, with current rate of exchange on New York, value received, and charge the same to account of

HUNTER & MARSHALL.

To S. MAYER & GLAUBER,  
Albany, Georgia.

[On the back of the draft were the following indorsements: First]:

Pay W. H. Patterson, cashier, or order, for collection for account of First National Bank, Lynchburg, Va.

(Signed) ALLEN W. TALLY, Cashier.

[Second]:

"Pay to John A. Davis, agent,<sup>7</sup> or order, for account of Citizens' Bank of Georgia, Atlanta, Ga.

(Signed) W. H. PATTERSON, Cashier."

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<sup>7</sup> Davis was the agent of the railroad company, the plaintiff in error. — C.

The evidence showed that the plaintiff in error had collected this draft; upon demand being made on plaintiff in error for the payment of the money thus collected by the attorney for defendant in error, payment was refused; the railroad claimed that the Citizens' Bank was indebted to it, and that they had given that bank credit for the amount thus collected. It was further shown that the Citizens' Bank had failed before the money had been collected by the Central Railroad and Banking Company.

The court below held that the Central Railroad and Banking Company was liable to the defendant in error, and this ruling is assigned as error.

1. The qualified indorsements on the back of this draft by the cashier of The First National Bank of Lynchburg, whereby he directs payment to be made to W. H. Patterson, cashier of the Citizens' Bank, or order, for collection for account of First National Bank, Lynchburg, Va., was nothing more nor less than a warrant of attorney authorizing the indorsee to collect the amount due on the draft for the indorser. It conveyed no title to the paper, but was notice to all persons subsequently dealing with this paper, that defendant in error had not parted with the title or intended to transfer the ownership of the proceeds to another. The legal import and effect of the indorsement was to notify the plaintiff in error that the defendant in error was the owner of the draft, and that the Citizens' Bank was merely its agent for collection; that a qualified title for this purpose only, and no other, was in the Citizens' Bank. (Morse on Banks, 52; *Swift v. Tyson*, 16 Peters, 1; 1 Howard, 234; 3 Penn. Stat. 348; 22 Md. 148; 1 Wall. 166; 102 U. S. 658; 1 Bond, 389; 11 R. I. 119; 51 Iowa, 15.)<sup>8</sup>

2. But it is insisted that there was no privity between these parties respecting the transaction, so as to authorize this action. When the plaintiff in error received from Mayer & Glauber the money due on the draft, they received something which belonged to the defendants in error; it was their money, and this act put them in privity for the purpose of this action. Where one person is in possession of money which of right and in equity belongs to another, this action may be maintained for its recovery. The law implies a promise on the part of any person who has received the money of another to pay that person on demand. The reception of money by one and the demand by the other makes all the privity that is necessary to maintain this action.

And we are clear that plaintiff in error had no right to retain the

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<sup>8</sup> Accord: *Commercial Bank v. Armstrong*, 148 U. S. 50; *Butchers', etc., Bank v. Hubbell*, 117 N. Y. 384; *Freeman's Bank v. National Tube Works*, 151 Mass. 413. — H.

proceeds of this draft as payment of or security for any balance which the Citizens' Bank might be due it.

Judgment affirmed.\*

## § 66      BROOK, OLIPHANT & CO. v. VANNEST.

58 NEW JERSEY LAW, 162. — 1895.

VAN SYCKEL, J. — This is an action to recover the amount due upon the following promissory note:

\$4,986.25.

TRENTON, N. J., *Jany.* 30, 1891.

Four months after date, we promise to pay to the order of ourselves, forty-nine hundred and eighty-six 25/100 dollars at the office of Wm. B. Brook & Co., at 40 John St., New York City, value received.

[Indorsed]

BROOK, OLIPHANT & Co.

BROOK, OLIPHANT & Co.

For discount and credit of the Central Rubber Selling Co.

JOHN H. BRITTON, *Treas.*

This note was executed by Brook, one of the firm of Brook, Oliphant & Company, in favor of said firm, and passed to the Central Rubber Company, without consideration.

It was discounted in New York for the Central Rubber Company, and was taken up by that company before it was due and put in its safe at Trenton, in this State.

The manager of the Central Rubber Company, after that and before the maturity of the note, passed it to Vannest, who is the plaintiff below.

The makers of the note set up in defense in the trial court — *first*, that the plaintiff below acquired no legal title to the note under the special indorsement of the treasurer of the Central Rubber Company; *secondly*, that the plaintiff below was not a *bona fide* holder for value.<sup>1</sup>

It is undoubtedly true that if the note had fallen into the hands of anyone before it had reached the bank which discounted it, he could not have acquired or passed to another any valid title to it.

The special indorsement would have been notice of an infirmity in the holder's title.

\* If a bill or note be indorsed without restriction by the payee and deposited in bank for collection and the banker pledge or sell it, the pledgee or buyer gets good title. *Collins v. Martin*, 1 Bosanquet & Puller, 648; *Ayer v. Tilden*, 15 Gray (Mass.) 178; *Bank v. Vanderhorst*, 32 N. Y. 553. But if the bill or note be restrictively indorsed "for collection" or "on account of A." (indorser), or B. (a third person), the pledgee or buyer gets no title other than that held by the bank as agent or trustee. *Treuttel v. Barandon*, 8 Taunton, 100; *Lloyd v. Sigourney*, 5 Bingham, 525; *First N. B. of Clarion v. Greegg*, 79 Pa. St. 384 (*semble*). — H.

<sup>1</sup> The portion of the opinion relating to this second point is omitted. — C.

But after that indorsement had served its purpose, and the note came back to the Central Rubber Company, that company, by passing it to Vannest, gave him as good a title as if the indorsement had not been special but general. \* \* \*

There is no error in the proceedings below, and, therefore, the judgment should be affirmed.<sup>2</sup>

## § 66

## HOOK v. PRATT.

78 NEW YORK, 371. — 1879.

THIS action was brought by plaintiff, as trustee of Charles H. Hook, against defendants, as executors of the will of James P. Haskin, deceased, upon a draft signed and indorsed by said testator, of which the following is a copy:

\$5,000.

SYRACUSE, N. Y., *September 13, 1872.*

ORRIN WELCH, Treasurer Morris Run Coal Co. Pay to the order of myself, one year after date, five thousand dollars, for value received.

(Signed) J. P. HASKIN.

[Indorsed] Pay to the order of Mrs. Mary Hook, 35 King, for the benefit of her son Charlie.

(Signed) J. P. HASKIN.

Defendants waived demand upon the drawee and notice of protest.

Upon the trial defendants' counsel moved for a nonsuit, in substance, upon the ground that the indorsement was restrictive and did not import a consideration, but imported a gift. The motion was denied and said counsel excepted.

RAPALLO, J. — The point mainly relied upon by the appellant is that the draft and indorsement upon which this action is brought do not on their face import a consideration.<sup>3</sup> The draft was drawn by the defendants' testator upon the treasurer of an incorporated company, payable to the drawer's own order and purported to be for

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<sup>2</sup> In *Moore v. First Nat. Bank*, 38 Colo. 336 (quoting the headnote), "a note, after having been indorsed to a bank, was indorsed by the bank to its president for collection, who later re-indorsed it to the bank without recourse; and the latter, without striking out its indorsement to the president, or adding further indorsement, transferred the note by delivery to plaintiff. The indorsement was not left by mistake, accident, or oversight. Held, that the bank is estopped to deny its liability, regardless of whether the re-issue was before or after maturity; and that such indorsement passed the legal title, fixed the indorser's liability, and authorized an action direct against it as indorser." Reported with notes in 10 L. N. S. 260 (where the correctness of the decision is questioned), 120 Am. St. Rep. 120, and 12 A. & E. Ann. Cas. 268. — C.

<sup>3</sup> In the court below it was said that "The only question in this case is whether the paper sued on imports a consideration, in view of the restrictive character of the indorsement, or if it does not, whether a consideration was proved." 14 Hun, 396, 397. — C.

value received. It was indorsed by the drawer by a special indorsement "Pay to the order of Mrs. Mary Hook, for the benefit of her son Charlie." The appellant claims that this is one of those restrictive indorsements which do not purport to be made for a consideration, and do not entitle the indorsee to maintain an action on the bill, without proving a consideration.

As a general rule an indorsement of a negotiable bill which purports to pass the title to the bill to the indorsee, imports a consideration, and the burden of proving want of consideration rests upon the party alleging it. The restrictive indorsements which are held to negative the presumption of a consideration are such as indicate that they are not intended to pass the title, but merely to enable the indorsee to collect for the benefit of the indorser, such as indorsements "for collection" or others showing that the indorser is entitled to the proceeds. These create merely an agency, and negative the presumption of the transfer of the bill to the indorsee for a valuable consideration.

But where the indorsement purports to pass the title to the bill therein from the indorser, and divest him of all beneficial interest, a consideration for such transfer is presumed. All the cases cited by the counsel for the appellant rest upon these principles. The citation from 3 Kent Com. 92, states the principle to be that when the indorsement is a mere authority to receive the money for the use or according to the directions of the indorser, it is evidence that the indorsee did not give a valuable consideration for it and is not the absolute owner. This accords with the statement of the principle by Wilmot, J., in *Edie v. E. India Co.* (2 Burr. 1227). So an indorsement "Pay to S. W., or order, for our use," (*Sigourney v. Lloyd*, 8 B. & C. 622; s. c. 3 Y. & J. 220), was held to create a mere agency, and the addition even of the words "value received" to such an indorsement has been held not to vary its effect. (*Wilson v. Holmes*, 5 Mass. 543.) In *Edie v. East India Co.* (2 Burr. 1221), the examples of restrictive indorsements put by way of illustration are, "Pay to my steward and no other person," or "pay to my servant for my use." These show that there was no intention to pass the title to the bill; and the same effect has been given to an indorsement, "Pay to P. only." It was held that these words indicated that the indorsee was agent only, and paid no consideration for the bill, as a purchaser would not have accepted such an indorsement. (*Power v. Finnie*, 4 Call [Va.], 411).

But an indorsement to one person for the use or benefit of another, affords no such indication. The indorser parts with his whole title to the bill, and the presumption is that he does so for a consideration. The only effect of such an indorsement, by way of restriction, is to give notice of the rights of the beneficiary named in the indorse-

ment, and protect him against a misappropriation.<sup>4</sup> When a bill is indorsed "Pay to A. or order for the use of B.," A. cannot pass the bill off for his own debt, but he can by indorsing it transfer the title, and will hold the proceeds for the benefit of B., and be accountable to him for them. (*Evans v. Cramlington*, Carth. 5, affirmed in the Exchequer Chamber, 2 Vent. 309.) In *Treuttel v. Barandon* (8 Taunt. 100), cited by the appellants, drafts payable to the drawer's own order were indorsed by him to De Roure & Co., or order, "for the account of Treuttel & Wurz." It appeared that De Roure & Co. were the agents of Treuttel & Wurz, and the latter were held entitled to maintain trover for the drafts against a party to whom De Roure & Co. had pledged them for their own debt. There is nothing in this case to sustain the proposition that a draft thus drawn and indorsed does not import a consideration, or that the indorsee could not maintain an action upon it against the drawer and indorser without proving a consideration. The effect of the special indorsement was simply to give notice of the interest of Treuttel & Wurz, and prevent De Roure & Co. from appropriating the drafts to their own use. *Blaine v. Bouine* (11 Rh. I. 119), is to the same point.

In the present case the indorsement did not purport to restrain the indorsee from negotiating the draft, for it was "Pay to the order of Mrs. Mary Hook" for the benefit of her son Charlie. She was constituted trustee of her son and held the legal title. (3 Kent's Com. 89.) The indorsement gave notice of the trust, so that if she had passed it off for her own debt, or in any other manner indicating that the transfer was in violation of the trust, her transferee would take it subject to the trust, but there was nothing reserved to the drawer and indorser. He retained no interest in it. The presumption is that the draft was drawn and indorsed by him for a consideration received either from the indorsee or the beneficiary. If the youth of the beneficiary should be deemed to afford a presumption that no consideration was paid by him, the presumption would be that it emanated from his mother. The facts admitted on the trial do not establish that the consideration was illegal. They show that the boy lived with his mother and was taken care of by her. There is nothing illegal in an undertaking by a putative father to support his illegitimate child, or to pay a sum of money in consideration of such support being furnished by another, though it be the mother of the child. If such was the consideration of this obligation, and it was furnished by Mrs. Hook, she was at liberty to take it, payable to herself in her own right, or for the benefit of her child. (*Hicks v. Gregory*, 8 C. B. 378; *Smith v. Roche*, 6 C. B. [N. S.] 223; *Nichole v. Allen*, 3 C. & P.

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<sup>4</sup> Neg. Inst. L., § 91, *post.* — H.

36; *Jennings v. Brown*, 9 Mees. & W. 496; *Knowlman v. Bluett*, 9 L. R. [Exch.] 1, 307; *Bunn v. Winthrop*, 1 J. Ch. 337, 338.)

The judgment should be affirmed.<sup>5</sup>

## § 67

## SMITH v. BAYER.

46 OREGON, 143. — 1905.

THIS is an action on a promissory note for \$290, executed and delivered by the defendants to the Concordia Loan & Trust Company of Kansas City, Mo., on January 30, 1896, due on or before August 1st following. The complaint alleges the execution of the note, its indorsement to the plaintiff before maturity, the making of certain payments thereon by defendants, and prays judgment against them for the balance. The answer admits the genuineness of the note, denies that it was indorsed to the plaintiff before maturity at all, and affirmatively alleges that it remained the property of the payee named therein until after maturity, when it was transferred to the Fidelity Trust Company, and that thereafter the defendants paid the note to the trust company and satisfied it in full. The reply denies the allegations of the answer, and affirmatively pleads that at all the times mentioned the plaintiff was and now is the owner in his own right of two-sevenths of the note, and since the 21st day of July, 1896, has been and now is the owner of the remaining five-sevenths for collection. Upon the trial plaintiff produced the note, with an indorsement thereon as follows: "Pay to the order of Milton W. Smith for collection and return to Concordia Loan & Trust Company, A. D. Rider, treasurer, O. K. F. Amelung." He testified that he received the note in due course of mail from the loan and trust company, inclosed in a letter which the witness produced, and which stated, in substance, that the note was remitted for collection. \* \* \* The note was then admitted in evidence over defendants' objection on the ground that the indorsement did not transfer such title to the plaintiff as would support an action thereon in his own name, and because the genuineness of the indorsement had not been sufficiently proved.\* The witness was also permitted to testify, over defendants' objection and exception, that he was in fact the owner in his own right of two-sevenths of the note, and the court instructed the jury that any settlement made by the defendants with the payee or owner of the note after the indorsement thereof to the plaintiff would not be a defense against the

<sup>5</sup> Whether the indorsement "pay to A. B. trustee," is restrictive, see discussion of instruments payable "to A. B. trustee," *post*, p. 354. — H.

\* That part of the case relating to the genuineness of the indorsement is omitted. — C.

plaintiff's two-sevenths interest therein, although it would be such defense against the other five-sevenths. The verdict and judgment were in favor of the plaintiff, and the defendants appeal.

BEAN, J. \* \* \* The only points of real importance on this appeal are: (1) Whether the indorsement, being on its face "for collection and return" to the payee, vested plaintiff with such a title as will enable him to maintain an action thereon in his own name; and, if so, (2) whether the court erred in admitting parol testimony tending to show that plaintiff was in fact the owner of two-sevenths of the note, and in instructing the jury that, if such was the case, any settlement with the payee or assignee subsequent to the date of the indorsement to plaintiff would be no defense as against plaintiff's two-sevenths.

The indorsement of a promissory note by the payee with the words "for collection," or the like, is not strictly a contract of indorsement, but rather the creation of a power, the indorsee being the mere agent of the indorser to receive and enforce payment for his use. The title to the note and the proceeds thereof remain in the payee, and he may maintain suitable actions and proceedings to enforce his right. *White v. National Bank*, 102 U. S. 658; *Commercial Bank of Pennsylvania v. Armstrong*, 148 U. S. 50; *Sweeney v. Easter*, 1 Wall. 166; *Williams, Deacon & Co. v. Jones*, 77 Ala. 294; *People's Bank of Lewisburg v. Jefferson County Savings Bank*, 106 Ala. 524; *Central Railroad v. First National Bank of Lynchburg, Virginia*, 73 Ga. 383.

There is, in the absence of a statute, some conflict in the decisions as to whether such an indorsee can sue in his own name. The weight of authority seems to be in favor of his right to do so. 4 Am. & Eng. Ency. Law (2d ed.), 274; *Freeman v. Exchange Bank*, 87 Ga. 45; *Roberts v. Parrish*, 17 Or. 583; *Falconio v. Larsen*, 31 Or. 137; Selover, Bank Collections, § 28. And it is now so provided by statute in this state. B. & C. Comp. § 4439; Selover, Negotiable Instruments Law, § 155; Crawford, Neg. Inst. Law, § 67. We are therefore of the opinion that the present action was rightfully brought in the name of the plaintiff.

It was open, however, as against him, to all defenses which could have been made if the notes had remained in the hands of the indorser, and the action had been brought by it. *Wilson v. Tolson*, 79 Ga. 137, 3 S. E. 900; *Leary v. Blanchard*, 48 Me. 269. The indorsement did not pass the title, nor did it deprive the defendants of any defense they may otherwise have against the note. It merely created the plaintiff the agent of the payee for collection with the right to sue in his own name. The plain meaning of such an indorsement, as said by Mr. Justice MILLER (*White v. National Bank*, 102 U. S. 658, 26 L. Ed. 250), is that the maker of the note "is to pay it to the indorsee

<sup>6</sup> N. Y., § 67. — C.



for the use of the indorser. The indorsee is to receive it on account of the indorser. It does not purport to transfer the title of the paper or the ownership of the money when received. Both these remain, by the reasonable and almost necessary meaning of the language, in the indorser."

Such being the effect of the restrictive indorsement and the character of the title acquired by the plaintiff by reason thereof, it necessarily follows that the court was in error in admitting evidence to contradict the contract of indorsement by showing that the note was not transferred to the plaintiff for collection as shown on its face, but that he actually owned two-sevenths thereof in his own right, and in instructing the jury that a settlement made with the payee after the indorsement to plaintiff would be no defense against plaintiff's two-sevenths. The contract of indorsement is in writing. The terms thereof are plain and unambiguous, and parol evidence is not admissible to vary or contradict it. *White v. National Bank*, 102 U. S. 658, 26 L. Ed. 250; *Leary v. Blanchard*, 48 Me. 269; *Howe v. Taylor*, 9 Or. 288.

The plaintiff's action is based on the indorsement, and not on any interest he may have in the note. He is made by the indorsement the mere agent of the payee for its collection. The defendants' obligation, notwithstanding the indorsement, is to the payee or subsequent owner of the note, and not to the plaintiff. If they settled and paid the note to the payee or assignee, such settlement is a complete defense to an action thereon by plaintiff as a mere agent for collection.

It may be suggested that, because the jury found a verdict in favor of plaintiff for the entire amount sued for, they must have found that the settlement alleged as a defense was never made, and therefore the error of the court in charging the jury in relation thereto was harmless. The ruling of the court upon this point and its instructions to the jury injected into the case an issue not proper to be tried, the result of which was to confuse and mislead the jury, and we do not think it can be said that the error was harmless.

From these views it follows that the judgment of the court below must be reversed, and a new trial ordered. Many of the other questions argued in the briefs will probably not arise on a retrial, and need not, therefore, be noticed at this time.

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## § 67 BLECKLEY, C. J., IN *FREEMAN v. EXCHANGE BANK*.

87 GEORGIA, 45. — 1891.

1. An indorsement for collection, or the like, is not a contract of indorsement, but the creation of a power, the indorsee being a mere agent to receive or enforce payment for the indorser's use. (*Central*

*Railroad v. First National Bank*, 73 Ga. 383; Tiedeman, Com. Pap., § 268; 1 Daniel, Neg. Inst., § 698-698(d); 2 Randolph, Com. Pap., § 724-5-6-7, 1009; 1 Morse Banks, § 217; 2 Id. §§ 583, 593; Bolles' Banks and Depositors, §§ 220, 384(e), *et seq.*; Benj. Chalmers' Bills, Notes and Checks, (2 Am. ed.), 132; *Commercial National Bank v. Armstrong*, 39 Fed. Rep. 684; [s. c. 148 U. S. 50]; *National B. & D. Bank v. Hubbell*, 117 N. Y. 384.)

A suit is not maintainable by the indorsee against the indorser. (*White v. National Bank*, 102 U. S. 658. And see *Lee v. Chillicothe Bank*, 1 Bond, 387.)

To sue other parties in order to enforce payment is deemed within the delegated power of the agent; and by reason of the great favor shown by the law to commercial paper, the restricted indorsee is allowed in some jurisdictions to sue in his own name. (*Wilson v. Tolson*, 79 Ga. 137; *Boyd v. Corbitt*, 37 Mich. 52; 2 Randolph, Com. Pap., § 726; Benj. Chalmers' Bills, Notes and Checks [2 Am. ed.], 133, 149.)<sup>7</sup>

The maker of a restricted indorsement can follow the bill or its proceeds over any number of subsequent indorsements, the terms of his indorsement being notice of his title. (Elementary Works cited *supra*: *First Nat'l Bank v. Reno. Co. Bank*, 3 Fed. Rep. 257; *Bank of the Metrop. v. First Nat'l Bank*, 19 Id. 301; *First Nat'l Bank v. Bank of Monroe*, 33 Id. 408; *In Re Armstrong*, Id. 405; *Commercial Nat'l Bank v. Hamilton*, 42 Fed. Rep. 880.) The last case is criticised from the standpoint of bankers, but only with reference to transmitting the proceeds of collection from the collecting bank to the intermediary through whom the bill was received. The expert opinion seems to be that transmission according to custom, by correspondence and proper entries of debit and credit founded thereon, the entries being made *after* collection, will serve commercially, and therefore legally, as the equivalent of paying over the money or forwarding it by mail or express; and consequently that transmission by such entries, each bank making the appropriate entry itself, will discharge the collecting bank. (See 45 Bankers' Magazine, 241; 4 Banking Law Journal, 3.) The learned United States circuit judge who decided the case which is thus criticised took a different view. \* \* \*

A deposit of paper in bank by a customer, he indorsing it "For deposit," may operate to clothe the bank with title under certain circumstances. (*National Commercial Bank v. Miller*, 77 Ala. 168; 2 Morse on Banks, § 577.) But the general rule is, that by a restrictive indorsement the depositor retains the title. (Bolles on Banks and Depositors, § 220.)

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<sup>7</sup> Contra: *Rock County N. B. v. Hollister*, 21 Minn. 385. In any event, only the special indorsee can sue. *Lawrence v. Fussell*, 77 Pa. St. 460. — H.

[Held: That where A. deposited a bill with B. indorsed "for deposit to the credit of A," and B. indorsed it, "Pay C. for collection account of B," and C. collected it, the funds were subject to garnishment in C's hands by the creditors of A., for as yet they had not actually been deposited in the hands of B. The legal import of the indorsement is to make B. an agent for collection and deposit. "The proceeds would be impressed with A.'s ownership until they were actually so deposited."] <sup>8</sup>

#### 4. QUALIFIED INDORSEMENT.

### § 68

#### RICE v. STEARNS.

3 MASSACHUSETTS, 225. — 1807.

ASSUMPSIT by indorsee against makers, upon a note payable to Jonathan Symonds, or order, and indorsed by him in these words: "for value received I order the contents of this note to be paid to Merrick Rice at his own risk." The defendants denied their signatures, and Symonds was offered as a witness to prove the execution of the note, and was objected to as a witness on the ground that he was interested. Objection overruled. Judgment for Plaintiff. Defendants appeal.

PARSONS, C. J. — The interest of Symonds must depend on the effect of his indorsement.

A security negotiable in its creation must, during its negotiation, preserve its negotiable quality; otherwise, when assigned, the assignee would hold a contract by the assignment different from the contract assigned. It is for this reason settled that a negotiable note indorsed in blank, or by a direction to pay the contents to A. B., omitting the words, "or his order," is further negotiable by the holder under such indorsement. It is also settled that when a negotiable security is indorsed, "*pay the contents to my use*," or, "*to the use of a third person*," or, "*carry this bill to the credit of a third person*," such an indorsement is not an assignment of the security, but is only an authority to pay the money agreeably to the direction of the indorsement. There are other restricted indorsements also made; as "*pay the contents to A. B. only*." Whether this indorsement is only an authority to A. B. to receive the money for the use of the

<sup>8</sup> There is some conflict as to the legal effect of an indorsement "For Deposit." Some courts hold that title passes under such an indorsement. *Ditch v. Western N. B.*, 79 Md. 192; s. c., 47 Am. St. Rep. 375 and note. Others hold that title does not pass, but that the bank is a bailee for collection until the money is actually in its hands, when it becomes a debtor as in the usual case of money deposits. *Beal v. City of Somerville*, 50 Fed. Rep. 647. — H.

indorser, or for his own use, if made for value received, or whether in this last case the restriction is not void, and A. B. may further negotiate it, seems not to be settled. If the property of the note be vested in A. B., perhaps he will hold it with its negotiable quality notwithstanding the restriction. But of this we give no opinion.

The case at bar is a restricted indorsement of another kind, and which in practice is very common. The promisee of a negotiable note indorses it to a third person, or his order, for value received, stipulating that the indorser is not to be responsible, if the maker does not pay it. If, notwithstanding this stipulation, the indorser is answerable, if the maker do not pay the note, then the witness, Symonds, is interested, and ought not to have been sworn.

Upon consideration we are of opinion that the promisee, indorsing the note under this express stipulation, is not eventually holden to pay the note, if the maker should not. As the promisee had the property of the note, he might dispose of it on what terms he pleased, with the assent of the purchaser, and the latter cannot complain of the necessary effect of his own agreement; and the indorser cannot be charged upon his own contract, directly against the express intent of it. If this opinion is correct, Symonds, after this restricted indorsement, had no interest in the event of the suit, and was a competent witness.

Another point of some importance arises, which involves the question, whether, by this restricted indorsement, the property of the note passed to the indorsee, so that he may sue upon it in his own name. If the restriction applied to the quality of the contract, so as to render a negotiable security no longer negotiable, there would be some difficulty in allowing, consistently with legal principles, an indorsement of this effect to operate as a transfer of the note. But this is not the effect of the restriction; the note remains negotiable in the hands of the indorsee, although he has no remedy against the indorser; and in whose hands soever the note may come, the maker is still liable, according to the terms of his original contract, to pay to the promisee or his order. The note, therefore, being the absolute property of the plaintiff, and Symonds being a competent witness, the verdict must stand, and judgment be entered accordingly.

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§ 68

EVANS v. FREEMAN.

142 NORTH CAROLINA, 61. — 1906.

PLAINTIFF sued upon a negotiable instrument which had been transferred to him by the following indorsement: "For value received, I hereby transfer and assign all my right, title and interest in and to the within note to J. D. Evans," etc. Judgment for plaintiff and defendant appeals

WALKER, J. \* \* \*

There is one other matter which requires some attention. The defendant contended that the plaintiff was not a holder in due course, because, by the terms of the indorsement, he was put on notice of any and all equities and defenses of the maker as against the payee, Askew, the reason being that only the right and title of the payee was transferred and the indorsee acquired no better title under such indorsement than his indorser himself had, but, *ex vi termini* only his right and title, which were subject to the defense set up in this action.

There was at one time very strong and convincing authority for such a position, *Aniba v. Yeomans*, 39 Mich. 171, and there was much also said against it, 1 Daniel Neg. Inst. (5th ed.) § 688c. But we think the controversy has finally been settled by the "Negotiable Instruments Law" as recently adopted, Revisal 1905, c. 54.

Ours is a qualified indorsement, under Revisal 1905, section 2187,<sup>9</sup> and while the indorser is constituted a mere assignor of the title to the instrument, it is provided that such an indorsement shall not impair its negotiability. A qualified indorsement may, by the express terms of that section, be made by adding to the endorser's signature the words "without recourse, or any words of similar import." It has been settled in commercial law that a transfer by indorsement of the "right and title" of the payee or an indorser to a negotiable note is equivalent to an indorsement "without recourse" and words such as were used in this case are therefore in their meaning or "import" similar to such an indorsement, and this is their reasonable interpretation. 1 Daniel, *supra*, §§ 700 and 700a; Norton on Bills and Notes (3d Ed.) 120; *Hailey v. Falconer*, 32 Ala. 536; *Rice v. Stearns*, 3 Mass. 225; Randolph Com. Paper (2d Ed.), §§ 721, 722, 1008; *Godard v. Lyman*, 14 Pick. (Mass.) 268; *Borden v. Clark*, 26 Mich. 410; Eaton & Gilbert on Commercial Paper, § 61.

However the law may have been, it is now true, as it appears from the statute and the authorities just cited, that such an indorsement does not, in law, discredit the paper or even bring it under suspicion, nor does it in any degree affect its negotiability. The indorsee is supposed to take it on the credit of the other parties to the instrument, Revisal 1905, § 2187, though the indorser may still be liable on certain warranties specified in the statute. Revisal 1905, § 2214.<sup>1</sup> This conclusion we believe to be in accord with the intention of the Legislature in enacting the Negotiable Instruments Law, as the leading purpose was to afford as much protection to the holders of commercial paper as is consistent with a just regard for the rights of other interested parties, and, by freeing its transfer of unnecessary fetters, to

<sup>9</sup> N. Y., § 68. — C.

<sup>1</sup> N. Y., § 115. On this point, see also *State v. Corning St. Sav. Bk.*, 139 Iowa, 338. — C.

promote its easy circulation and to give it greater currency as a medium of exchange. Our decision on this part of the case is confined to the particular evidence rejected and does not extend to any other offer of proof made by the defendant. If the defendant is able to show that the note was indorsed to the plaintiff after its maturity or that the latter is not, in fact, a purchaser for value and without notice, his defense will be available to him, but the burden to establish either of those facts is upon the defendant, as the plaintiff is deemed *prima facie* to be a holder in due course if he has possession of the note under the indorsement.<sup>2</sup>

[On other grounds, however, the judgment was reversed and a new trial granted.]

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### 5. CONDITIONAL INDORSEMENT.

§ 69

### JOHNSON *v.* BARROW.

12 LOUISIANA ANNUAL, 83. — 1857.

SPOFFORD, J. — This suit is brought against the indorser of a promissory note of the following tenor:

DONALDSONVILLE, 30th Oct., 1851.

One year after date, I promise to pay to the order of Robert R. Barrow the sum of five hundred dollars, for value received, payable at the office of the Recorder, Donaldsonville.

(Signed) JOHN HUTSON.

[The indorsement is in these words:]

HOUMA, PARISH OF TERREBONNE.

I indorse the within note for the benefit of Mrs. Hutson in the purchase of a tract of land from Gov. H. Johnson.

(Signed) R. R. BARROW.

The defendant pleaded that this restrictive indorsement does not bind him, inasmuch as the special object for which it was given was never consummated, Mrs. Hutson not having purchased a tract of land from the plaintiff Johnson.

There was judgment in the defendant's favor, and the plaintiff has appealed.

It is needless to recapitulate any other facts than that Mrs. Hutson did not buy a tract of land from Henry Johnson, nor contract to do so in any manner that could bind her.

The condition with which the defendant clogged his indorsement of the note never having been accomplished, the plaintiff has no action against him.

The judgment is, therefore, affirmed with costs.<sup>3</sup>

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<sup>2</sup> Accord: *Lomax v. Picot*, 2 Randolph (Va.) 247. — C.

<sup>3</sup> In *Robertson v. Kensington* (4 Taunt. 30), the indorsement was "Pay the within sum to A., or order, upon my name appearing in the 'Gazette' as

## IV. Indorsement: Methods and effect.

### 1. INDORSEMENT OF INSTRUMENT PAYABLE TO BEARER.

#### § 70

#### RIDER v. TAINTOR.

4 ALLEN (MASS.) 356. — 1862.

CONTRACT upon the following promissory note:

\$107.

LEE, Dec. 1, 1860.

Six months from date, for value received, I promise to pay Stephen E. Avery, or bearer, one hundred and seven dollars, with use.

ALBERT J. TAINTOR.

[The note bore the following indorsement:]

Pay E. A. Bliss, cashier, or order.

WARREN NEWTON, *Cashier*.

At the trial in the superior court, it appeared that the plaintiff had purchased the note in suit before it became due for a full consideration, but the bill of exceptions stated that "there was no evidence that E. A. Bliss, to whom said note had been indorsed, had transferred or indorsed said note to the plaintiff;" or "that the plaintiff had any title in said note from said Bliss, or that said note was sued with the knowledge or assent of said Bliss." Rockwell, J., ruled that the plaintiff was entitled to recover, and the jury returned a verdict accordingly; and the defendant alleged exceptions.

BIGELOW, C. J. — The contract of the promisor of the note declared on is to pay the sum due on the note at its maturity to the person who shall then be the bearer. The production of the note by the plaintiff is therefore evidence of his title; and, accompanied as it was in the present case with proof that the plaintiff had become the owner of the note by purchase before it became due, established a conclusive right to recover against the defendant.

ensign in any regiment of the line, between the 1st and the 64th, if within two months from this date." In this form the bill was accepted by defendants, who subsequently paid the bill to E., a remote indorsee of A. The payee's name did not appear in the 'Gazette,' and he brought an action against the acceptor. *Held*: plaintiff could recover. It is the rule of this case that is changed by § 69 of the Neg. Inst. Law. A conditional indorsement does not affect the negotiability of the instrument. *Tappan v. Ely*, 15 Wend. (N. Y.) 362. The indorsee is a trustee for the conditional indorser if the condition is not fulfilled. — H.

[“The payee indorses to A., specifying in the indorsement that it is upon the express condition precedent that the indorsee shall within two days deliver to indorser a certain horse. The condition is not fulfilled. At maturity the maker pays the indorsee. At common law the maker's payment would not be availing, and the indorser could collect from him. *Robertson v. Kensington*, 4 Taunt. 31. The section changes this and protects the maker. The indorser must look to the indorsee for redress.” Professor L. M. Greeley in 2 Ill. Law Rev., at p. 151. — C.]

The indorsement of a third person, directing the payment of the note to be made to the order of another, did not change the contract of the promisor, or enable him to set up in defense that the plaintiff's title was imperfect, merely because he had not obtained the signature of the person to whom some intermediate holder had ordered the note to be paid. (*Wilbour v. Turner*, 5 Pick. 526; *Waynam v. Bend*, 1 Camp. 175; Story on Notes, § 132.)

Exceptions overruled.

§ 70

JOHNSON *v.* MITCHELL.

50 TEXAS, 212. — 1878.

THE facts are stated in the opinion.

GOULD, ASSOCIATE JUSTICE. — This suit was brought by B. F. Mitchell against appellants, W. L. Johnson and C. R. Bedford, the makers of a promissory note, payable January 1, 1873, to J. W. Crabtree, or bearer, and against Crabtree, who had indorsed the note as follows: "I hereby assign the within note to S. L. Gilbert for value received, and guarantee the solvency of the makers of said note, 11th of September, 1873. J. W. Crabtree."

The averments of Mitchell's petition as to his right or title to the instrument sued on were, that he was the legal holder and owner of the note; that Crabtree sold and transferred it to Gilbert, setting out the assignment as indorsed, and that, after said transfer, he (plaintiff) purchased the note from Gilbert, who transferred it to him by delivery. The only evidence of ownership introduced by Mitchell was the note and indorsement. The defendants had all filed a general denial, but produced no evidence. A jury being waived, the court gave judgment against Johnson and Bedford as principals and Crabtree as guarantee. Johnson and Bedford asked for a new trial, claiming that the evidence was insufficient to support the judgment; and their motion being overruled, they alone have appealed.

It is insisted, on their part, that the production of the note, transferred as it was to Gilbert, did not establish that Mitchell was the legal holder or owner.

As Crabtree does not complain, the sole question is as to the legal effect of possession of a note payable to bearer and indorsed in full by the payee, as against the makers.

Feeling that uniformity of decision, in all cases important, is not least so in questions of commercial law, and failing to find decisions directly in point, we have given the authorities bearing on the question a careful examination.

According to the elementary authorities, a bill or note payable to order and indorsed in blank, so long as the indorsement continues



blank, "is in effect payable to bearer." (Chitty on Bills [11th ed.] 227; 3 Kent [9th ed.] side p. 89; Story on Bills, § 60; 2 Pars. on Notes and Bills, p. 19, note w; Edws. on Bills and Notes, 131, 269; 1 Dan'l. on Neg. Inst. § 693; *Greeneaux v. Wheeler*, 6 Tex. 522; *Wethered v. Smith*, 9 Tex. 625; *Whithed v. McAdams*, 18 Tex. 553; *Ross v. Smith*, 19 Tex. 172.)

Lord Mansfield said, in *Peacock v. Rhodes*: "I see no difference between a note indorsed in blank and one payable to bearer;" and Chancellor Kent said, in *Conroy v. Warren*: "A note indorsed in blank and one payable to bearer are of the same nature. They both go by delivery, and possession passes property in both cases." (2 Doug. 636; 3 Johns. Cases, 263.) So "a note payable to the maker's order becomes, in legal effect, when indorsed in blank, a note payable to bearer." (Byles on Bills, ch. 7, p. 68; *Brown v. De Winton*, 6 M. G. & S. [60 Eng. Com. Law], 336.)

From these authorities, we conclude that Mitchell's possession was at least as satisfactory evidence of his ownership as it would have been had the note been payable to Crabtree or order, indorsed in blank by Crabtree, and then indorsed in full by Gilbert and someone other than Mitchell.

The negotiability of a note payable to bearer is certainly not further restrained by an indorsement in full than would be, by the same indorsement, the negotiability of a note payable to order and indorsed in blank by the payee. But the rule is well settled, that "if a bill be once indorsed in blank, though afterwards indorsed in full, it will still, as against the drawer, the payee, the acceptor, the blank indorser, and all indorsers before him, be payable to bearer, though as against the special indorser himself title must be made through his indorsee." (Byles on Bills [5th ed.], 109; cited by Pollock in 2 Exch., *infra*; Chitty on Bills, 228, 230a; 3 Kent, side p. 90; Story on Prom. Notes, § 139; 2 Pars. on Notes and Bills, 19, 26; *Walker et al. v. McDonald*, 2 Exch. [Welsby, H. & G.], 531; citing *Smith v. Clark*, 1 Peak. N. P. C. 295, and 1 Esp. 180; *Mitchell v. Fuller*, 15 Penn. 270; *Huie v. Bailey*, 16 La. 213; *Little v. O'Brien*, 9 Mass. 423; *Dugan v. The United States*, 3 Wheat. 172; Edw.'s on Bills and Notes, 275; citing *Dolfus v. Frosch*, 1 Denio, 367; *Savannah National Bank v. Haskins*.)

We conclude, then, that however it might have been as against Crabtree, on which point we express no opinion, as against the makers of the note, its production by Mitchell was sufficient evidence of title.

It may be objected that the safe transmission, by mail or otherwise, of notes and bills payable to bearer requires a different rule. The answer is, first, that such a consideration will not justify a departure by the courts from established principles and precedents, second, that what is known as a "restrictive" indorsement stops the currency of negotiable paper. (Chitty on Bills, 232; Story on Prom.

Notes, § 142, *et seq.*; 2 Pars. on Notes and Bills, 21; 1 Dan'l. on Neg. Inst., § 698.)

Whilst we have disposed of the case on the assumption that Crabtree's transfer was equivalent to an indorsement in full to Gilbert or order, it is not intended to pass upon that question. Looking to the original nature of the note, which was that it should pass by delivery, and following what was long since said to be the settled rule, "that the assignment follows the nature of the thing assigned," it may be questioned whether that indorsement does not receive full effect by treating it as intended to secure Crabtree's liability as guarantor to Gilbert or bearer. (See *Edie v. East India Co.*, 2 Burr. 1216; *Lane v. Krekel*, 22 Iowa, 400.)

The judgment is affirmed.

Affirmed.

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## § 70 MCKEEHAN, THE NEGOTIABLE INSTRUMENTS LAW.

[41 AM. LAW REG., N. S., pages 454-462.]

SECTION 9 [N. Y., § 28], par. 1-5:

"The instrument is payable to bearer (1) when it is expressed to be so payable; or (5) when the only or last indorsement is an indorsement in blank."

Section 40 [N. Y., § 70], which is involved in the discussion of Section 9, par. 1-5, reads:

"When an instrument, payable to bearer, is indorsed specially, it may nevertheless be further negotiated by delivery; but the person indorsing specially is liable as indorser to only such holders as make title through his indorsement."

One or two preliminary observations may aid to a proper understanding of the criticisms made of these sections.

Blank indorsements were unknown to the early law of Bills and Notes, which required that the name of the indorsee should be contained in the indorsement. A practice later arose by which the payee often wrote only his own name on the back of a bill, leaving a blank above his signature for the name of the indorsee. Hence the term "blank indorsement." The bill being transferred in this condition, the transferee or any subsequent holder has an implied authority "to write above the signature an order of payment to himself, or to bearer, or to anyone to whom he may wish in turn to transfer the bill; and the blank indorsement, when so filled up, takes effect by relation from the time of the original delivery by the indorser."<sup>4</sup> The transferee or any subsequent holder is the indorser's agent for this purpose.

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<sup>4</sup> Ames' Cases on "Bills and Notes," Vol. 2, p. 837.

For a long time it was necessary to exercise this authority and fill out all the blank indorsements on a bill at or before trial. Gradually this last requirement was dispensed with, and thus a bill payable to the order of A.—with A.'s name written on the back (no indorsee being named) could be recovered on by the holder.<sup>5</sup> Such instruments are said to be payable to bearer, and indeed they are so while the indorsement remains blank, but although the *necessity* of filling up a blank indorsement has been dispensed with, the *right* to do so has never been abridged, and the holder of a bill or note has to-day, as he always had, the right to fill up any or all blank indorsements on the instrument and thus make it payable only to order.

It is to be observed — and this is important — that these rules in no way violate the original tenor of the instrument. The maker has promised to pay "A or order" and A., by signing his name with a blank above it and handing it to B., authorizes B. or any subsequent holder to designate the person entitled to receive payment. Until they do so designate him, the holder is the man entitled. Now, suppose B. indorses specially to C. or order, and then C. transfers the paper to D. by mere delivery. Should D. be allowed to sue the maker as on a note payable to bearer? No, for since the maker has promised only to pay to A.'s order — and since A. has given B. or any holder authority to designate the one to whom the sum shall be paid — and since B. has designated that it shall be paid "to C. or order" — plainly no one who cannot trace title through C. comes within the terms of the maker's promise. That is the logical view, and it is the view that the merchants and bankers adopted, *i. e.*, a blank indorsement of a note payable to order is controlled by the subsequent special indorsement.

But the courts held otherwise. In the case of *Smith v. Clarke*,<sup>6</sup> decided in 1794, a bill originally payable to order, was indorsed in blank by the payee and was subsequently indorsed specially. Lord Kenyon held that the bill was payable to bearer as long as the first indorsement remained blank, and that the holder might therefore strike out the special indorsement and recover as on a bill payable to bearer. *Smith v. Clarke* has been generally followed both in England and America.<sup>7</sup> This decision was opposed to the view held by

<sup>5</sup> This added a new term to the indorser's order. *i. e.*, that until the blank was filled up the instrument should be payable to bearer.

<sup>6</sup> Peake, 225. Although in a case which arose some years earlier, *Anchor v. Bank of England*, 2 Douglas, p. 637 (1781), Lord Mansfield evidently agreed with the understanding of merchants that a blank indorsement was controlled by a subsequent special indorsement. However, the exact point decided in *Smith v. Clarke* was not involved in that case.

<sup>7</sup> *Walker v. Macdonald*, 2 Wels. Hurl. & Gordon, 526 (1848); *Houie v. Bailey*, 16 La. 213 (1840); *National Bank v. Haskins*, 101 Mass. 370 (1869); *Houry v. Eppinger*, 34 Mich. 31 (1876); *Waterliet Bank v. White*, 1 Denio.

the business community, and so, in 1882, framers of the English act, in order "to bring the law into accordance with the mercantile understanding, by making a special indorsement control a previous indorsement in blank,"<sup>8</sup> provided in section 8, par. 3:

"A bill is payable to bearer which is expressed to be so payable, or on which the only or last indorsement is an indorsement in blank."

The provisions of section 9 [N. Y., § 28], par. 1-5 of the American act are the same as those of the English act and were inserted for the same reason.

It is further to be observed that *Smith v. Clarke* and all of the cases which follow it are cases of instruments *originally payable to order*. None of these cases contains a syllable about instruments originally made payable to *bearer*. There is an important distinction between the two kinds of instruments. For reasons which I have referred to above, the custom of merchants, which has now been adopted by both the English and American acts, says that in the case of an instrument originally payable to order, a blank indorsement is controlled by a subsequent special indorsement, because in such a case the maker's promise embraces only those who make title through the special indorsement. But a note *originally payable to bearer* is another matter. It is a violation of the plain tenor of such a note to treat it as other than payable to bearer. That is the maker's absolute promise — to pay the bearer. His promise cannot be qualified or changed in any way by a subsequent holder. The only effect of a special indorsement on such a note is that the *indorser* can be held only by those who make title through his indorsement.<sup>9</sup>

This distinction between instruments originally payable to bearer and instruments originally payable to order and then indorsed in blank is preserved both in the English and American acts. Under both acts, a note originally payable to bearer and specially indorsed continues payable to bearer, while an instrument originally payable to order is payable to bearer only when the last indorsement is in blank. Professor Ames says that this distinction is "illogical and undesirable" though he gives us no reasons. Judge Brewster's reply is equally brief: "The reason why such a rule is 'illogical and undesirable' is not clear." It is submitted that for the reasons noted above, this distinction is decidedly "logical," and inasmuch as it appears to obtain generally throughout the business community, its continued observance by the Code would seem to be "desirable."

Professor Ames further criticises this sub-section, as follows:

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608 (1845); *Pentz v. Winterbottom*, 5 Denio, 51 (1847); *French v. Barney*, 1 Iredell, 219 (1840); *Mitchell v. Fuller*, 15 Pa. 268 (1850); *Rand v. Dovey*, 83 Pa. 280 (1877). Contra: *Myers v. Friend*, 1 Randolph, 12 (1821).

<sup>8</sup> Chalmers' Bills of Exchange, 5th edition, p. 24.

<sup>9</sup> Story, Bills of Exchange, § 207; Wood's Byles on Bills and Notes, 151.

"If an instrument indorsed in blank and subsequently indorsed specially, so that it is no longer payable to bearer, is transferred by the special indorsee by delivery merely, the transferee cannot sue parties prior to the special indorser in his own name, but only in the name of his assignor. This puts the assignee to unnecessary inconvenience. As owner of the instrument, although not, according to this subsection, holder, he ought to have the right to strike out the special indorsement, thus making the instrument once more payable to bearer, and as bearer to sue upon it in his own name." *I. e.*, A. makes a note to B. or order. B. indorses in blank. C. indorses it "to D. or order" and D. delivers it (without indorsement) to E. Professor Ames thinks that E. should have the right to strike out C.'s indorsement and sue A. or B. as on a note payable to bearer.

Why should he have this right? It has long been the law (and still is under section 48)<sup>1</sup> that the holder may strike out any indorsements which are not necessary to his title. The law has never permitted him to strike out indorsements which are necessary to his title.<sup>2</sup> Now, so long as Lord Kenyon's doctrine<sup>3</sup> prevailed, the holder had the right to strike out all indorsements subsequent to the first blank indorsement because the instrument was by that first blank indorsement payable to bearer and a subsequent special indorsement did not change its tenor and was therefore not necessary to his title. But this subsection was inserted for the express purpose of doing away with Lord Kenyon's doctrine. Everybody agrees that a blank indorsement of an instrument originally payable to order ought to be affected by a subsequent special indorsement. What does this change mean, then? Why it means (taking the case Professor Ames supposes for us) that by virtue of the special indorsement by C. the note has again become payable *only to order*, and therefore C.'s indorsement cannot be stricken out by a subsequent holder *because it is necessary to his title*. Suppose D. had in his turn indorsed specially to E. The latter (though now a *holder* within the meaning of the act) could not strike out the indorsements of C. and D. Why? Because the instrument being now again payable to order only, the indorsements of C. and D. are necessary to his title, and so section 48 gives him no right to strike them out. Professor Ames says, "As owner of the instrument, he ought to have the right." But ownership of a bill or note gives the holder no right to alter it — to change the tenor of any of the promises which it evidences.

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<sup>1</sup> Section 48 [N. Y., § 78]: "The holder may at any time strike out any indorsement which is not necessary to his title. The indorser whose indorsement is struck out, and all indorsers, subsequent to him are thereby relieved from liability on the instrument."

<sup>2</sup> Story, *Promissory Notes*, § 208.

<sup>3</sup> *Smith v. Clarke*, *supra*.

Judge Brewster answers this criticism, however, in another way. He first agrees with Professor Ames that E. (in the case supposed) ought to be allowed to strike out C.'s special indorsement, and then he tries to give him this right.<sup>4</sup> He first points to section 48, which gives the right to strike out indorsements not necessary to title. But Professor Ames reminds him that section 48 confers this right only on *holders* and that E. is not a holder, for "holder" is defined in section 191 [N. Y., § 2] to mean "The payee or indorsee of a bill or note who is in possession of it, or the bearer thereof," and "bearer" is defined by the same section to mean "The person in possession of a bill or note which is payable to bearer." Both ignore the fact that in the case supposed C.'s indorsement is necessary to E.'s title.

In order to give E. the right to sue the maker, Judge Brewster next refers to section 40, which provides *inter alia* that "When an instrument payable to bearer is indorsed specially, it may nevertheless be further negotiated by delivery."

"This section," says Judge Brewster, "which authorizes a transfer by delivery seems to give the transferee the right to sue in his own name, otherwise the note would not be negotiated within the meaning of the act." But if section 40 applies to a note originally payable to order — then indorsed in blank and made payable to bearer — and then indorsed specially — if such an instrument may still be negotiated by delivery, then the rule of *Smith v. Clarke* is still in full force, and section 9, par. 5, which was inserted to overthrow *Smith v. Clarke* is a nullity. That carries us to the next criticism.

Professor Ames insists that section 40 completely nullifies section 9, par. 5, and that for this reason only may E. sue the maker in the case supposed. His position is that section 9, par. 5, was inserted to change the old rule that an instrument "payable to bearer (or indorsed in blank)"<sup>5</sup> although afterwards specially indorsed, was still negotiable by delivery — that "then, in apparent forgetfulness of the effect of section 9, par. 5," section 40 was inserted providing that an instrument payable to bearer and indorsed specially is still negotiable by delivery, the special indorsee being liable only to such as

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<sup>4</sup> Mr. Farrell answers Professor Ames as follows: "In answer to this, it is necessary only to say that in most jurisdictions he may bring suit in his own name, being the real party in interest." (The Negotiable Instruments Law, by Jno. Lawrence Farrell. Brief of Phi Delta Phi, Vol. III, No. 2, First Quarter, 1901.) But the statutes which permit an assignee to sue in his own name have effected merely a procedural change. He is still an assignee merely and can be met by any defense arising out of the instrument which could be pleaded against the assignor. The question is not in whose name shall E. bring suit (a minor point), but it is what right can E. assert.

<sup>5</sup> These are Professor Ames' words; but if by "Payable to bearer" he means *originally* payable to bearer, it is submitted that neither *Smith v. Clarke* nor any of the cases which follow it say any thing about such instruments. They are all cases of instruments originally payable to order.

make title through his indorsement, and that this section (40) thus changes the law back to its former state.

Judge Brewster's answer is:

"Section 40 is claimed to be repugnant to section 9, par. 5, but this is not so. Section 9, par. 5, declares a note to be payable to bearer when its last indorsement is in blank; 40 *relates to a note when the last indorsement is special, and provides that it may then be transferred by delivery*,<sup>6</sup> in order to cover cases of good faith where title is frequently passed in that way, by persons ignorant of mercantile usage."

It is submitted that that is no answer, and for this reason. If a bill *may be transferred by delivery*, it is payable to bearer. Section 40, on Judge Brewster's reading, permits a bill whose last indorsement is special to be payable to bearer, yet section 9, par. 1-5 was inserted to permit only bills originally payable to bearer or whose last indorsement is in blank to be payable to bearer.<sup>7</sup>

I submit that in one way and one way only can these two sections be harmonized. If section 40 be interpreted as applying only to instruments originally payable to bearer, there can be no difficulty as to either section.<sup>8</sup> True, it reads merely "When an instrument payable to bearer is indorsed specially," etc., and there is no denying

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<sup>6</sup> The italics are the reviewer's.

<sup>7</sup> Judge Brewster cites the following passage from the new Norton Horn Book by Mr. Tiffany, p. 116, to prove that section 40 and section 9, par. 5, are in harmony: "An instrument which is originally payable to bearer, or which has been indorsed in blank, though afterwards specially indorsed, is still payable to bearer; except as to the special indorser, who, on such an indorsement, after such an indorsement, is only liable on his indorsement to such parties as make title through it."

It is submitted that the above tends to prove just the reverse, because if by section 40 an instrument originally payable to order, then indorsed in blank, and then specially indorsed, is still payable to bearer, section 9, par. 5 (which intended to make only instruments whose last indorsement is in blank payable to bearer) is nullified.

Mr. Crawford, the draughtsman of the Act, actually regards section 40 as embodying the decision of *Smith v. Clark* (Crawford's Annotated Negotiable Instruments Law, p. 41). Yet admittedly section 9, par. 5, was intended to overthrow that decision.

<sup>8</sup> (Supplementary Note. In commenting upon the above suggestion, Professor Ames has pointed out that section 9-1 includes, not only instruments originally payable to bearer, but also instruments originally payable to order and indorsed by the payee expressly "Pay to bearer." 16 Harvard Law Review, 257. This seems clearly right, and it would seem to show that the writer's suggestion should be modified to this extent, that section 40 should be construed as applying only to instruments expressly payable to bearer, thus including instruments originally so drawn, and also instruments originally drawn to order and then expressly indorsed by the holder "Pay to bearer." With this modification, the writer is still of opinion that the suggested construction of section 40 would satisfactorily harmonize that section with section 9-5.)

that if it meant only an instrument originally payable to bearer it should have said so. At the same time, the words used are commonly understood to describe an instrument originally payable to bearer, and there is the additional reason that unless these words are so interpreted here, the section is diametrically opposed to section 9, par. 5, a conclusion plainly to be avoided if possible. Again, section 9, par. 5, can be construed in only one way, while section 40 may be construed either as being opposed to or as being in harmony with it. Moreover, such an interpretation would be good law. At the opening of the discussion of these sections, some reasons were submitted why the distinction between instruments originally payable to bearer and those originally payable to order and indorsed in blank, was both logical and desirable. However this may be, such a distinction is certainly made in section 9, par. 5, and it has been made without complaint for twenty years in the English act. The suggested interpretation of section 40 preserves this and the two sections would be harmonious. By section 9, par. 1, an instrument originally payable to bearer continues to be payable to bearer even though specially indorsed. But if it is specially indorsed, then by section 40 "the person indorsing specially is liable as indorser only to such holders as make title through his indorsement," and this has always been the law. By section 9, par. 5, on the other hand, a bill originally payable to order is payable to bearer only when the only or last indorsement is in blank. Every one of these propositions is good law and accords with the understanding of merchants.

The remaining criticism of this subsection is unimportant. "If it is to be taken as it stands," says Professor Ames, "a note payable by A. to the order of B., and bearing the anomalous blank indorsement of C., would be payable to bearer. This, of course, would be an absurdity, but it is certainly true that the only indorsement is an indorsement in blank."

Professor Ames does not suggest that any merchant, any lawyer, any court would ever give the section such a construction. Nor does it require any stretch of the English language to arrive at its proper meaning. An anomalous indorser is not strictly an indorser at all. He is called one for convenience sake, and a liability closely resembling that of an indorser is fastened upon him. But a section which uses the word "indorsement" with reference to the transfer of an instrument, could scarcely be regarded as having any reference whatever to an anomalous indorser. The words used in section 9, par. 5, of the American act have been found entirely satisfactory in the English act throughout twenty years' experience, and there can be no reasonable doubt as to their meaning with reference to an anomalous blank indorsement.



## 2. INDORSEMENT WHERE PAYABLE TO TWO OR MORE PERSONS.

## § 71

## DWIGHT v. PEASE.

3 McLEAN, 94 (s. c. 8 FED. CAS. 186). — 1842.

[U. S. Circuit Court, Dist. Mich.]

OPINION OF THE COURT. — This action was brought upon the following promissory note :

DETROIT, *January 1, 1837*. Two years after date, I promise to pay to the order of Walter Chester, and Pease, Chester and Co., one thousand and five hundred dollars, for value received, at the Farmers and Mechanics' Bank of Michigan, with interest.

(Signed) JOHN CHESTER.

[Indorsed:] PEASE, CHESTER &amp; Co.

[and also] D. E. JONES (in blank).

The declaration contained three counts, to the first of which there was a demurrer. This count states that one John Chester, on the 1st of January, 1837, made his note payable to order of Walter Chester, and Pease, Chester & Co., and that Pease, Chester & Co., under their partnership name, indorsed and delivered the said note to the plaintiff. John Chester, the maker, was a member of the firm of Pease, Chester & Co. Demand of the note when due, and notice to the defendants, was proved.

Walter Chester, one of the promisees in the note, seems not to have indorsed it, and this is fatal to the right of the plaintiff. The interest of the promisees is joint in the note, and not being in partnership, they must each transfer the note. (*Chitty on Bills*, 123; *Tayl.* 55; *Carvick v. Vickery*, Doug. 653; *Jones v. Radford*, 1 Camp. 83; 21 Eng. C. L. Rep. 41.)

Only one-half of the note was transferred by the indorsement of Pease, Chester & Co., and this does not give a right to their or any subsequent assignee to sue on the note. Recourse against the maker cannot thus be divided and suits multiplied. The plaintiff seeks by this action to recover the full amount of the note against the defendants, as indorsers. But as he holds but one-half of the note under the assignment, the indorsement, at most, can only be evidence of that amount.

The declaration is defective in not averring that Walter Chester, one of the payees, did indorse the note. Demurrer sustained. The plaintiff dismissed his action.<sup>1</sup>

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<sup>1</sup> In *Allen v. Corn Exchange Bank*, 87 App. Div. (N. Y.) 335, 337, it was said that "where commercial paper is payable to two or more persons, who are not co-partners, it must be indorsed by all to give good title to a transferee. . . . In *Wood v. Wood*, 16 N. J. L. 428, it was held that one joint payee of a promissory note cannot indorse it either in his own name alone or

## 3. INDORSEMENT WHERE PAYABLE TO CASHIER, ETC.

§ 72 JOHNSON *v.* BUFFALO CENTER STATE BANK.

134 IOWA, 731. — 1907.

ACTION on certificate of deposit issued by the Clay County Bank of Felton, Minn., to "E. E. Secor, Cashier," and by indorsement of "E. E. Secor, Cashier," transferred to the State Bank of Dows, and by that bank to plaintiff. It is alleged that Secor, to whom as cashier the certificate of deposit was issued, and by whom it was indorsed, was the cashier of the defendant bank, and, acting in that capacity, transferred the instrument to the State Bank of Dows. In the answer of defendant it is admitted that Secor was its cashier at the time of the transaction in question; but it is alleged that the Clay County Bank was a copartnership of which Secor was a partner, and that the certificate was made use of by him for his own personal benefit, and not for the use or benefit of the defendant bank, which received no consideration therefor, and that Secor acted without the knowledge or consent of any officer or agent of the defendant bank and without its authority. The court directed a verdict for the plaintiff, and from the judgment on that verdict defendant appeals.

MCCLAINE, J. The first contention for the appellant is that the question whether plaintiff was a holder of the certificate of deposit in due course — that is, a purchaser for value before maturity without notice of any defenses — should have been submitted to the jury. \* \* \* We think that, had the question been submitted to a jury, there could have been no other finding than that plaintiff was a *bona fide* holder without notice before maturity on good consideration, and therefore in this respect there was no error in directing a verdict.

The next contention is in substance and effect that Secor was, in fact, negotiating the certificate of deposit in his own interest, and not

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in his own name and that of his co-payee. They are not considered partners either in the commercial or legal sense of the term." See this case for other authorities.

In *Haydon v. Nicoletti*, 18 Nev. 290, 302, the court said: "We have considered the questions before discussed, upon the theory that a note like the one in suit, indorsed by one only of two joint payees, is subject to any equities existing in favor of the maker, the same as though it had not been indorsed by either; and such, we think, is the law. Such a note is payable to both, or to their joint order. By the law merchant it cannot be transferred except by the joint indorsement of all the payees. *Ryhiner v. Feickert*, 92 Ill. 311, and authorities there cited. If a note unindorsed is not transferred in good faith, then one indorsed by a part only is in the same situation. Such a note is surely only transferred in part."

See also *Kaufmann v. State Sav. Bank*, 151 Mich. 65, reported in 18 L. N. S. 630, with note entitled "Indorsement by one of two joint payees or indorsers of a bill or note." — C.

for defendant bank, and it is insisted that, as the name of the defendant bank is not inserted in the instrument as payee, nor placed upon the back of it as indorser, nothing was imported in the transaction involving liability on the part of defendant bank. But it is conceded in the record that Secor at the time the certificate was issued payable to him as cashier, and at the time it was indorsed by him as cashier, was in fact the cashier and managing officer of the defendant bank, and that the certificate was transferred apparently as a part of the business of the bank. In section 42<sup>2</sup> of the Negotiable Instruments Act (29th Gen. Assem., p. 85, c. 130; Code Supp. 1902, § 3060a42), it is provided: "Where an instrument is drawn or indorsed to a person as 'cashier' \* \* \* of a bank, \* \* \* it is deemed *prima facie* to be payable to the bank \* \* \* of which he is such officer, and may be negotiated by either the indorsement of the bank, \* \* \* or the indorsement of the officer." Under this provision it was competent for the plaintiff to show that Secor was the cashier of the defendant bank, and was acting in that general capacity in transferring the instrument, and as against plaintiff, a *bona fide* holder without notice, it was not competent for the defendant bank to show that as a matter of fact he was making use of his official title and authority in his own individual interest. Even were this not so, it clearly appears that the State Bank of Dows paid for the certificate of deposit by a Chicago draft payable "to the order of E. E. Secor, Cashier," and that the proceeds of this draft became a part of the funds of the bank. It seems to us that, as against the plaintiff, no further inquiry could be permitted. We must look at the whole transaction with reference to the position of plaintiff, an innocent holder for value. He was not charged with notice of the dealings between "Secor, Cashier," and the defendant bank which he represented, and in whose interest he appeared to act. Under the section of the Negotiable Instruments Act just quoted the relations of the parties were not different from what they would have been had the certificate of deposit been issued to the defendant bank and indorsed in its name by Secor, acting as its cashier. \* \* \*

The judgment is therefore affirmed.<sup>3</sup>

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<sup>2</sup> N. Y., § 72. — C.

<sup>3</sup> "The usage is universal for presidents and cashiers of incorporated companies, acting as the executive officers and agents of such companies, to make, in their behalf, indorsements and transfers of negotiable paper, by simply indorsing their names, with the additions of their titles of office. I cannot doubt that such an indorsement is sufficient to charge the corporation under whose authority the indorsement is made, and to transfer the note to the indorsee, so that the latter can maintain an action thereon in his own name." HALL, J., in *State Bank v. Fox*, 3 Blatch. (U. S.) 431. — H.

[In *First National Bank v. McCullough*, 50 Or. 508, 512. the court, after citing certain decisions, says: "The rule to be extracted from these decisions

## 4. INDORSEMENT WHERE NAME MISSPELLED, ETC.

§ 73

BOLLES *v.* STEARNS.

11 CUSHING (MASS.) 320. — 1853.

FROM the auditor's report, it appeared that Stearns was the holder of a note executed by Bolles payable to "John P. Reed, or order," and indorsed "Joseph P. Reed." There was, when the note was given, a person living in the same town whose name was "John P. Reed," but it was proved that the note was in fact given by Bolles to Joseph P. Reed for money lent him by the latter, and that it was indorsed by Joseph P. Reed to Stearns.

METCALF, J. \* \* \* The court are also of opinion that the note given by the plaintiff, payable to John P. Reed, or order, and indorsed to the defendant by Joseph P. Reed, cannot be allowed to the defendant by way of set-off. That note, though given for money lent to the plaintiff by Joseph P. Reed, was made payable, not to him, but to John P. Reed, a person *in esse*. Now it is certain that the legal interest in that note was not transferred to the defendant by Joseph P. Reed's indorsing his name on it. He was not the payee nor the legal representative of the payee. And a transfer by indorsement can be made in the first instance only by the payee, or by some one claiming in his right, as his executor, administrator, or assignee in bankruptcy or insolvency. (Kyd on Bills [1st Amer. ed.], 106, 107.) If there had been no such person as John P. Reed, perhaps the note might have been regarded as payable to bearer, and might have been passed to the defendant by delivery, as if it had in terms been made payable to bearer. Of this, however, we give no opinion. But as the note was made payable not to a fictitious person, but to a person in being, the indorsement of a third person transferred no legal title to it.

If the indorsement and delivery of this note to the defendant by Joseph P. Reed, could be regarded as an equitable assignment of it, still the defendant would not be entitled to set it off against the plaintiff's claim on him, because it is not shown that notice of such assign-

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has been embodied in our statute, known as the 'Uniform Negotiable Instrument Law' as follows: [quotes N. Y., § 72]. The clause just quoted, and the decisions adverted to, are undoubtedly based on the theory that the employment of the qualifying word 'cashier' or other designation of a fiscal office, appended to the name of a payee or indorsee of commercial paper, creates an ambiguity as to the real party intended, to explain which parol evidence is admissible to show who is the principal for whose benefit such agent received or accepted the promise to pay a stipulated sum of money."

For another case decided under the Negotiable Instruments Law, see *Griffin v. Erskine*, 131 Iowa, 444. — C.]

ment was given to the plaintiff before this action was commenced. (Rev. Sts., c. 96, § 5.)

[Set-off on the note not allowed.]

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#### 5. PRESUMPTION AS TO TIME OF INDORSEMENT.

§ 75 *RANGER v. CARY*, 1 Metcalf (Mass.) 369. — 1840.

DEWEY, J. — The instructions of the court of common pleas, to which exceptions were taken, embraced substantially the following propositions: 1. That the burden of proof was on the defendants to show that the note was transferred after it was due and when dishonored, if they would avail themselves of a defense only open to them as upon a dishonored note. \* \* \* Upon the first point, the law is very fully settled according to the rule stated by the judge at the trial. A negotiable note being offered in evidence, duly indorsed, the legal presumption is that such indorsement was made at the date of the note, or at least antecedently to its becoming due; and if the defendant would avail himself of any defense that would be open to him only in case the note was negotiated after it was dishonored, it is incumbent on him to show that the indorsement was in fact made after the note was overdue.

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#### 6. PRESUMPTION AS TO PLACE OF INDORSEMENT.

§ 76 *CHEMICAL NATIONAL BANK OF NEW YORK v. KELLOGG*.

183 NEW YORK, 92. — 1905.

ACTION on a note dated "New York, June 7th, 1898," and payable at "No. 4 Warren Street, New York."

The defendant is an accommodation indorser, who indorsed the note at her residence in Oak Tree, New Jersey, at the request of the maker, her husband, and there delivered the same to him, solely for his benefit. The plaintiff, a banking corporation in the city of New York, discounted the note in the ordinary course of business, without notice that the indorser was a non-resident or that the indorsement was made in another state, and used the proceeds to take up a prior note held by it. The defendant "did not authorize said note to be negotiated in New York State, and had no knowledge that it was to be used in that state." By the laws of the state of New Jersey a married woman is not liable as an accommodation indorser, guarantor or surety unless it appears that she or her separate estate has derived some benefit from the contract.

Upon these facts, which were found or stipulated, the trial court held the defendant liable on the ground that her indorsement was a

New York contract. The Appellate Division unanimously affirmed and the defendant came here.

VANN, J. Each indorsement of a promissory note is a separate contract, standing apart from that made by the maker or any other indorser. (*Spies v National City Bank*, 174 N. Y. 222, 225.) The validity of a contract of indorsement is ordinarily determined by the law of the place where the indorsement is made. (*Union National Bank v. Chapman*, 169 N. Y. 538, 543.)

As the note in question was indorsed by the defendant in the state of New Jersey, where she resided, under ordinary circumstances she would not be liable thereon, because the laws of that state do not permit a married woman to become a simple accommodation indorser. The laws of the state of New York, however, authorize a married woman to contract, even with her husband, the same as if she were unmarried, and it is insisted that the defendant is estopped from denying that her indorsement is a New York contract, inasmuch as the plaintiff, in good faith, purchased the note for value, before maturity, without notice of anything to put it on inquiry and in reliance upon the fact that it was dated and made payable in the state of New York, with nothing on the face of either the note or the indorsement to suggest that the contract was made in the state of New Jersey. We think this position is sound. Whoever conceals facts required by good faith and fair dealing to be disclosed, acts inequitably and will not be permitted to assert those facts to the injury of one misled by such conduct. The defendant could not make her coverture a trap to catch innocent persons. She could not deliberately give the appearance of validity to her contract and then as against a *bona fide* holder plead that it was invalid. She knew that the note was dated and payable in New York, and that the presumption from those facts was that it was indorsed there. She also knew that if she delivered the note in this condition to her husband to enable him to negotiate it, any one who acted on such presumption, as he lawfully might in the absence of notice, would be injured if she should plead her coverture and that she actually indorsed it in New Jersey. It was, therefore, her duty, if she wished to act honestly toward others, to attach some notice to her indorsement, or give notice in some other way, so that innocent third parties might not be harmed by relying upon appearances which she had aided in creating. If she had written after her name, "Oak Tree, New Jersey," her place of residence, the plaintiff would have been put upon inquiry as to the validity of such a contract made in that state. With no attempt to give notice, by her indorsement in blank she gave currency to the note as one made and indorsed in New York. Pleading her indorsement as a New Jersey contract under these circumstances would be an attempt to take advantage of her own wrong, which the law will not permit.

The business of the country is done so largely by means of com-

mercial paper that the interests of commerce require that a promissory note, fair on its face, should be as negotiable as a government bond. Every restriction upon the circulation of negotiable paper is an injury to the state, for it tends to derange trade and hinder the transaction of business. Commercial necessity requires that only slight evidence should be insisted upon to establish an *estoppel in pais* as to the validity of commercial paper. The only practicable rule is to make the face of the paper itself, when free from suspicion, sufficient evidence, in the absence of notice, against all who aided to put it into circulation in that condition, unless the note is void by the positive command of a statute, such as the act against usury. No other rule would work well, for it would be intolerable if every bank had to learn the true history of each piece of paper presented for discount before it could act in safety. It is better that there should be an occasional instance of hardship than to have doubt and distrust hamper a common method of making commercial exchanges.

While it is unnecessary that the defendant should describe herself as a guarantor by adding the word "surety" to her signature, for possession by her husband, who was prior in order of liability to herself, was notice that she did not indorse in the ordinary course of business, still if she regarded her indorsement as a New Jersey contract she should have given notice of that fact in some way so that a purchaser in good faith might know that it was not what it appeared to be, a New York contract. (*Smith v. Weston*, 159 N. Y. 194; *Bank of Monongahela Valley v. Weston*, 159 N. Y. 201.) Even in the state of New Jersey, where the common-law disabilities of married women have not been wholly removed, her indorsement would be enforced as a New York contract. (*Thompson v. Taylor*, 66 N. J. L. 253.)

Independently of the statute which will be cited presently, the argument in favor of an equitable estoppel rests mainly on the presumption that a note dated and payable in New York was made and indorsed in that state. While this question has seldom been before the courts, Mr. Daniel in his useful work on Negotiable Instruments says it is the law and the authorities support the assertion. (Daniel on Neg. Inst. [5th ed.] § 728; *Maxwell v. Vansant*, 46 Ill. 58; *Towne v. Rice*, 122 Mass. 67; *Bedford v. Bangs*, 15 App. Ct. Rep. 76; *Lennig v. Ralston*, 23 Penn. St. 137; *Snaith v. Mingay*, 1 M. & S. 87; Edwards on Bills, etc., § 378; Tiedeman on Bills & Notes, § 91.) Even if the question were entirely new, sound reasoning would lead to that conclusion. While the contract made by an indorser is independent of that made by the maker in the sense that it is of a different nature, and can be separately enforced, still it is dependent on the promise of the maker, because it is an agreement to perform his promise, upon certain conditions, if he does not. Therefore, the place where the maker promised, as stated in the note itself, must with all the other provisions thereof be read into the promise of the indorser, and it thus becomes

by fair presumption, in the absence of notice to the contrary, the place where the indorser promised also. The purchaser has no other guide as to a fact which may involve the validity of the contract, and hence it is a commercial necessity that both contracts, so closely connected that the second cannot exist without the first, should be presumed to have been made at the same place, unless the one with power so to do rebuts the presumption by timely notice.

The learned counsel for the defendant seems to recognize the existence of this presumption, as he says in his points that, "If we examine the note alone, then the negative inference might possibly arise that the defendant intended the note should be governed by the laws of another state." He insists, however, that as the plaintiff stipulated the facts at the trial, it knew the defendant did not so intend. The rights of the parties do not depend on what the plaintiff knew at the time of the trial, but on what it knew when it discounted the note, and at that time, owing to the absence of notice, which was the defendant's fault, it had no information but what the note gave. The defendant knew that her husband could use the note in any state, and the place of date and payment indicated the state where he expected to use it. Unless she intended that it should be used in a state where her indorsement would bind her, she must have intended to defraud and hence is estopped.

But, to clinch the argument, we have only to refer to the Negotiable Instruments Law, which provides that: "Except where the contrary appears, every indorsement is presumed *prima facie* to have been made at the place where the instrument is dated." (L. 1897, ch. 612, § 76.) This statute was prepared for uniform action in all the states, and it has already been adopted in many. It is regarded as simply declaratory of the common law upon the subject under consideration. (Eaton & Gilbert on Commercial Paper, § 66.) Therefore, when the note was presented for discount in New York, the plaintiff had the right under the statute to presume that it was indorsed in the state where it was dated, because nothing appeared to the contrary. The defendant, by her indorsement, aided in the negotiation of a note carrying with it that presumption, both at common law and according to the statute, and after the plaintiff had acted on the presumption she cannot be heard when she attempts to say that she indorsed in a state where her indorsement is not binding, and that she did not intend to be bound by her promise when she made it.

The judgment should be affirmed, with costs.

CULLEN, Ch. J., GRAY, BARTLETT, HAIGHT and WERNER, JJ., concur; O'BRIEN, J., absent.

Judgment affirmed.<sup>4</sup>

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<sup>4</sup> This case is reported with notes in 2 L. N. S. 299, and in 5 A. & E. Ann. Cas. 158.

On the question of the conflict of laws as applied to the liability of parties



## 7. CONTINUATION OF NEGOTIABLE CHARACTER.

§ 77

LEAVITT *v.* PUTNAM.

[Reported herein at p. 272.]

## 8. STRIKING OUT INDORSEMENT.

§ 78

JERMAN *v.* EDWARDS.

29 APPEAL CASES (DIST. OF COL.) 535. — 1907.

ACTION on note against maker, and against payee Jerman who had indorsed in blank. Following the blank indorsement were the words: "To acc't of Benjamin F. Edwards," and on the face of the note appeared the stamp of the Washington Savings Bank. Whether the words just recited were written by Edwards, or were indorsed by the savings bank as an indication of the credit to be entered by it in case of its collection of the note, did not appear. Plaintiff produced Edwards as a witness, who proved the signatures of the maker and indorser. The defendants objected to the note on the ground of variance. Plaintiff then, without any ruling by the court, struck out the words "To acc't of Benjamin F. Edwards" in the presence of the court and again offered the note. Objection was again made on the ground that this was a restrictive indorsement, that it was stricken out without right, and that the plaintiff was not the *bona fide* holder of the note as she was not the indorsee of the same, and was not entitled to maintain an action thereon. Plaintiff claimed the right to strike out the indorsement under section 1352 of the Code.<sup>5</sup> The court overruled the objection, and permitted the note to be read to the jury. Defendants offering no evidence, the court instructed the jury to return a verdict for the plaintiff.

Mr. Chief Justice SHEPARD delivered the opinion of the court:

We think there was no error in the action of the court. Assuming, as contended by the appellants, that the note had been actually indorsed by Benjamin F. Edwards to the savings bank for collection for his account, the bank failed to collect it, and returned it presumably

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to negotiable instruments, see the following cases: *Union Nat. Bank v. Chapman*, 169 N. Y. 538, 57 L. R. A. 513 (note), 88 Am. St. Rep. 614 (note); *Spies v. Nat. Cit. Bank*, 174 N. Y. 222, 61 L. R. A. 193 (with exhaustive note); *Amsinck v. Rogers*, 189 N. Y. 252, 12 L. N. S. 75 (note), 121 Am. St. Rep. 858 (note), 12 A. & E. Ann. Cas. 450 (note); *Sykes v. Cit. Nat. Bank*, 78 Kan. 688, 19 L. N. S. 665 (note); *Brown v. Gates*, 120 Wis. 349.

See also the following notes discussing some of the above cases: 2 Col. Law Rev. 253, 257; 8 *id.* 134; 1 Mich. Law Rev. 508; 2 *id.* 627; 6 *id.* 338. — C.

<sup>5</sup> N. Y., § 78. — C.

to him. Plaintiff's title as holder did not pass under that indorsement, but through the delivery to her by Benjamin F. Edwards, who appeared as a witness on her behalf. She took title by delivery under the blank indorsement of the payee, Jerman, the effect of which was to make the note payable to bearer, and pass by delivery.\* Code, § 1338<sup>6</sup> (31 Stat. at L., ch. 854). Whether the further indorsement, if in fact made by Benjamin F. Edwards, was a restrictive one, as defined in section 1341<sup>7</sup> is a question of no materiality, as the plaintiff did not claim the title thereunder, and there was no defense to the note as against either Benjamin F. Edwards, the savings bank, or the plaintiff. This indorsement not being necessary to the title of the plaintiff, she had the right to strike it out. Code, § 1352.<sup>8</sup> This provision of the Code is but declaratory of the law as it was recognized before the adoption of the Negotiable Instruments Act. See *Vanarsdale v. Hax*, 107 Fed. 878, 880, and cases cited.

It follows that the judgment must be affirmed, with costs. It is so ordered.

Affirmed.<sup>9</sup>

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## V. Transfer without indorsement.

### § 79

### OSGOOD v. ARTT.

17 FEDERAL REPORTER, 575. — 1883.

[From Circuit Court, N. D. Illinois.]

ARTT gave the R. & M. R. Co. his negotiable note for \$2,500 secured by mortgage. The R. & M. R. Co. gave Osgood a bond for \$2,500 and in it "assigned and transferred" Artt's note and mortgage as security, and specified that "said note and mortgage are hereto appended." The bond, note and mortgage were attached firmly together with eyelets in the order named. Each had the number 1964 written on it. Osgood at this time had no notice of any defense to Artt's note. Subsequently Osgood learned of the defense (failure of consideration

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\* The note was originally payable, not to bearer, but to the order of Jerman. — C.

<sup>6</sup> N. Y., § 64. — C.

<sup>7</sup> N. Y., § 67. Reference should apparently be to § 1340, which in N. Y. is § 66. — C.

<sup>8</sup> N. Y., § 78. — C.

<sup>9</sup> "The note had been indorsed by the plaintiff before maturity to a bank, and deposited with it for collection. It was protested, and then returned to the plaintiff. When produced at the trial, it bore this indorsement to the bank, uncanceled. The defendant contends that upon these facts it appears that the bank has the legal title, and was the only proper party to sue. The bank received the title for the sole benefit of the plaintiff. When it returned

and fraud), and *thereafter* the R. & M. R. Co. indorsed the note by writing its name upon the back.

HARLAN, J., (after stating the facts). — These facts have been especially found by a jury, and the sole question for determination is whether, upon this finding, the plaintiffs are entitled to judgment. The only issue of fact made on the third plea is whether Osgood, prior to the indorsement of the note, had notice of the alleged fraud and failure of consideration.

1. It is a settled doctrine of the law merchant that the *bona fide* purchaser for value of negotiable paper, payable to order, if it be indorsed by the payee, takes the legal title unaffected by any equities which the payer may have as against the payee.

2. But it is equally well settled that the purchaser, if the paper be delivered to him without indorsement, takes, by the law merchant, only the rights which the payee has, and therefore takes subject to any defense the payer may rightfully assert as against the payee. The purchaser in such case becomes only the equitable owner of the claim or debt evidenced by the negotiable security, and, in the absence of defense by the payer, may demand and receive the amount due, and if not paid, sue for its recovery, in the name of the payee, or in his own name, when so authorized by the local law.

3. As a general rule the legal title to negotiable paper, payable to order, passes, according to the law merchant, only by the payee's indorsement on the security itself. The only established exception to this rule is where the indorsement is made on a piece of paper, so attached to the original instrument as, in effect, to become part thereof, or be incorporated into it. This addition is called, in the adjudged cases and elementary treatises, an *allonge*. That device had its origin in cases where the back of the instrument had been covered with indorsements, or writing, leaving no room for further indorsements thereon. But, perhaps, an indorsement upon a piece of paper, attached in the manner indicated, would now be deemed sufficient to pass the legal title, although there may have been, in fact, room for it on the original instrument.

4. But neither the general doctrines of commercial law, nor any established exception thereto, make words of mere assignment and

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the note protested, the plaintiff became an indorsee in possession, and invested with the rights belonging to all holders of commercial paper. Gen. St. 1902, § 4170 [N. Y., § 2]. One of these was to cancel the indorsement which it had made. Gen. St. 1902, § 4218 [N. Y., § 78]. Whether it exercised this right or not was immaterial. Its mere possession of the note was sufficient evidence of ownership to support the suit. Gen. St. 1902, § 4221 [N. Y., § 90]; *Dugan v. United States*, 3 Wheat. 172." BALDWIN, J., in *New Haven Mfg. Co. v. New Haven Pulp and Board Co.*, 76 Conn. 125, 131.

See also *Berney v. Steiner Bros.*, 108 Ala. 111, and *Middleton v. Griffith*, 57 N. J. L. 442. — C.

transfer of such paper — contained in a separate instrument, executed for a wholly different and distinct purpose — equivalent to an indorsement within the rule, which admits the payer to urge, as against the holder of an unindorsed negotiable security, payable to order, any valid defense which he has against the original payee.

5. The transfer of the note in suit, by words of assignment in the body of the railroad company's bond, did not, in the judgment of the court, amount to an indorsement of the note, although the bond, note, and mortgage were originally fastened together by eyelets. The facts set out in the third plea, and sustained by the special finding, constitute, therefore, a complete defense to the action, unless, as contended by plaintiffs, the subsequent endorsement, in form, by the railroad company, after Osgood was informed of Artt's defense, has relation back to the time when the former, without notice of such defense, purchased the note for value then paid.<sup>1</sup> If, at the time of Osgood's purchase, it had been agreed that the company should *indorse* the note, but the indorsement was omitted by accident or mistake or fraud upon the part of the company, a different question would have been presented. In such case, the company might, perhaps, have been compelled to make an indorsement which would have been deemed effectual as of the time when, according to the intention of the parties, it should have been made. But no such case is presented by the special finding. It is entirely consistent with the facts found that the indorsement by the company was an afterthought, induced by notice of Artt's defense, and was not within the contemplation or contract of the parties when Osgood purchased the bond. Moreover, and as a circumstance significant of an intention to restrict, in some degree, the assignability of the note and mortgage, it is expressly stipulated, in the company's bond, that they are transferable in connection with the bond, and not otherwise.

I am of opinion that the facts which came to Osgood's knowledge prior to the indorsement, and which, in substance, constitute the defense set out in the third plea, furnished notice that the company had, by reason of fraud and failure of consideration, lost its right to demand payment of the note from Artt. By the indorsement, after such notice, Osgood could not acquire any greater rights than the company possessed. He did not become the holder of the note by *indorsement*, as required by the law merchant, until after he had notice that the company could not rightfully pass the legal title, so as to defeat Artt's defense.

While the adjudged cases are not in harmony upon some of these propositions, the conclusions indicated are, in the opinion of the court, consistent with sound reason, and are sustained by the great weight of

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<sup>1</sup> As to this contention, see *Watkins v. Maule*, 2 Jac. & W. 244, and *Baggarly v. Gaither*, 55 N. C. 80. — C.

authority. (Chief Justice Marshall in *Hopkirk v. Page*, 2 Brook, 41; *Sturges' Sons v. Met. Nat. Bank*, 49 Ill. 231; *Melendy v. Keen*, 89 Ill. 404; *Haskell v. Brown*, 65 Ill. 37; *Lancaster Nat. Bank v. Taylor*, 100 Mass. 24; *Bacon v. Cohea*, 12 Smedes & M. 522; *Grand Gulf Bank v. Wood*, Id. 482; *Clark v. Whitaker*, 50 N. H. 474; *Haskell v. Mitchell*, 53 Me. 468; *Franklin v. Twogood*, 18 Iowa, 515; *French v. Turner*, 15 Ind. 59; *Folger v. Chase*, 18 Pick. 63; *Whistler v. Forster*, 14 C. B. 246 (108 E. C. L. 248); *Harrop v. Fisher*, 10 C. B. [N. S.] 196; *Gibson v. Minet*, 1 H. Bl. s. p. 606; Story, Notes, § 120; Story, Bills, § 201; Chitty, Bills [12th Amer. from 9th Lond.], 252; 2 Pars., Notes and Bills, 1, 17, 18; 1 Daniel, Neg. Inst. [3d ed.], §§ 664a, 689a, 690, 741, and 748a.) The facts specially found do not authorize a judgment for the plaintiff.<sup>2</sup>

## VI. Retransfer to prior party.

§ 80

ADRIAN *v.* McCASKILL.

103 NORTH CAROLINA, 182. — 1889.

ACTION against defendants, McCaskill & McLean, as indorsers on a promissory note executed and delivered January 10, 1884, payable to W. C. Patterson or order. Plaintiffs purchased the note for value

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<sup>2</sup> In *Lyon, Potter & Co. v. First Nat. Bank*, 85 Fed. 120, 124, the court said: "A mere assignee of a promissory note, like an assignee of any other chose in action, takes his title subject to all the equities and defenses which exist between the assignor and the other parties to the instrument. An indorsee for value, without notice, before maturity, takes the title to a promissory note, according to the custom of merchants and the now established law of the land, free from all those equities and defenses. The discount and delivery of this note without its indorsement effected a mere assignment of the note, and under that assignment the bank took and held it subject to the original equities between the parties. Neither the delivery before nor the indorsement after maturity could exempt the bank from the defenses of the original makers or indorsers, because the bank was a mere assignee before maturity, and the indorsement after maturity transferred the legal title subject to all the defenses of which the overdue character of the paper gave notice. The fact that the indorsement was omitted by mistake could not deprive the bank of notice of the character of the paper, and carry the effect of the subsequent indorsement back to the date of the delivery, because the omission itself—the mistake itself—was notice, and the knowledge which that notice imputed could not be subsequently extracted from the mind of the cashier of the bank as of the date of the discount. *Bank v. Taylor*, 100 Mass. 18, 22, 23; *Younker v. Martin*, 18 Iowa, 143, 145; *Franklin v. Twogood*, id. 515; *Grimm v. Warner*, 45 Iowa, 106; *Haskell v. Mitchell*, 53 Me. 468."

See also *First Nat. Bk. v. McCullough*, 50 Or. 508, reported in 17 L. N. S. 1105, with note entitled "Right of transferee, without indorsement, of bill or note payable or indorsed to order of transferrer, to protection as a *bona fide* purchaser." — C.

from Patterson in January, 1885, after its maturity, without any actual notice of the defenses set up in the answer of the defendants.

In February, 1884, Patterson indorsed the note in blank and delivered it to the defendants to secure them for such sums of money as he might owe them at the end of 1884. Later, on February 23, 1884, defendants indorsed the note in blank, and with the knowledge and consent of Patterson, delivered it to Williams & Company, to be held by this company as security for money loaned to the defendants in 1884, said indorsement being solely to secure the company as above stated. In October, 1884, defendants paid Williams & Company the money borrowed of the latter, and the company returned the note to the defendants. The defendants held the note until December 5, 1884, when they returned it to Patterson, being satisfied to trust him for the balance then due them without said security; but by accident, oversight and mistake they failed to erase their names as indorsers. At the time the note was returned to Patterson, he knew that the defendants were not liable as indorsers on the note, and they believe that he knew they failed to erase their names through accident, oversight and mistake. Patterson also knew that the names of the defendants, as indorsers, were not there for his accommodation and that he had no legal or moral right to use their names as such; and he knew that he had no right to deliver the note to the plaintiffs with the indorsement of the defendants on the same.

The plaintiffs objected to the introduction in evidence of the above facts, and insisted that, as it was admitted that they had no actual notice of them, the evidence of said facts was not competent or admissible against them. The trial judge held that the evidence was competent, and thereupon gave judgment for the defendants. From this judgment the plaintiffs appealed.

DAVIS, J. The note is dated January 10, 1884, and is payable to "W. C. Patterson or order," on the 1st day of November. It is indorsed by the payee and by the defendants, the name of the payee appearing as first in order. On the 25th day of January, 1885, more than twelve months after its date, and long after its maturity, the plaintiffs became the purchasers from the payee, with the indorsement as set forth.

Were the facts, admitted to be true, admissible to explain the character and nature of the indorsement of the defendants?

The plaintiffs say that, as they had no actual notice of "any such equities of defense," and were purchasers for value, the evidence was not competent as against them.

By statute, promissory notes, whether with or without seal, are made assignable, "in like manner as inland bills of exchange are by custom of merchants in England." They are, in the language of the mercantile law, "negotiable" and may be transferred and negotiated, free from any equities which exist between the original parties to

them. "Each indorser, including the payee, down the line, has and passes the legal title, and his indorsement in legal import is a contract with his indorsee, and all subsequent holders by indorsement, that the maker will pay the note, or \* \* \* he will." *Hill v. Shields*, 81 N. C. 250, and the cases there cited, and innumerable decisions, English and American, cited in Parsons, Daniel, Randolph and other elementary writers upon the subject, indicate the solicitude of courts to protect *bona fide* purchasers and innocent holders of negotiable paper, so essential to commerce and trade; and the construction placed upon section 177 of the Code (C. C. P., § 55, in *Harris v. Burwell*, 65 N. C. 584, and *Martin v. Richardson*, 68 N. C. 225, has been limited to the makers of promissory notes, etc., and held not to apply as between indorsers.

Conceding the importance of protecting *bona fide* holders of commercial paper "in its unchecked circulation," what are the liabilities of the defendants in the present case? That the holder of a negotiable note is presumed to be the owner admits of no question, and that, after such a note is put in circulation, indorsers are liable in the order of succession, is equally clear, if the indorsement be not limited or qualified. No prior indorser can look to any subsequent indorser. "One who obtains possession of a bill or note, after indorsing it, is restored to his original position, and cannot, of course, hold intermediate parties, who could look to him again." 2 Ran. Com. Pa. S. 719. It must be equally clear that one who derives possession from him, with notice of this fact, cannot hold such intermediate indorsers liable, and, when such indorsements are in blank, parol testimony is admissible to show the relation in which they stand. *Ibid.*, §§ 778, 841 and 883.

When the note was returned to Patterson, he became again the owner, and, as between him and any subsequent indorsers, the relation of indorser and indorsee ceased. The plaintiffs were not the indorsers of the defendants. It is clear that Patterson could not, by reason of the blank indorsement of McCaskill & McLean, hold them liable for the note, for he stood in the relation to them of a prior indorser. The plaintiffs derived their title directly from Patterson, the original payee, who had re-acquired the title, and not as successive indorsers, deriving title through the indorsement of the defendant; and this distinguished this case from *Hill v. Shields*, *supra*; *Parker v. Stallings*, Phil. 590, and similar cases.

The plaintiffs were affected with, and bound by, notice of what appeared upon the note itself, and they took the note from the original payee, bearing upon its face the fact that he was the first indorser, and that the defendants were his indorsees.

An indorsement in blank by the payee is presumed to have been intended as a transfer, and, though this may be rebutted by parol proof (*Davis v. Morgan*, 64 N. C. 570), the admitted facts in this case

show that the indorsement by the payee was in accord with the presumption — a transfer to McCaskill & McLean.

But it is insisted that, as between the indorsers in blank, the holder may fill the blank by making it payable to himself, or to any one he may choose. This is so where he obtains the note, not from the payee, or a prior indorser, but holds it as a *bona fide* purchaser, without any knowledge or notice of the relation sustained by prior indorsers to the note. In the present case, if the plaintiffs, purchasing the note, not from the defendants, but from the prior indorsing payee, had filled the blank indorsement of McCaskill & McLean to themselves, it would not have been in accordance with what they knew the fact to be, and would have been a gross wrong, if not fraud, upon the defendants.

The plaintiffs further rely upon the well-settled rule "that whenever one of two innocent persons must suffer loss by the acts of the third, he who, by his negligent conduct, made it possible for loss to occur, must bear the loss, for it is against reason that an innocent party should suffer for the negligent conduct of another," and that the defendants, by neglecting to erase their indorsement, "induced the plaintiffs to rely on the legal import of the indorsement, and ought not to be allowed, against the plaintiffs, purchasers for value and without notice, to make proof of the alleged facts."

Though the plaintiffs had no "actual notice," we have already seen that they were charged, in law, with notice of facts apparent upon the face of the paper which they purchased from Patterson.

But the defendants may have been indorsers for accommodation, or as sureties or guarantors. True; and the indorsement of a note by a third person, made at the time of its execution, binds him, according to the intention of the parties, either as joint principal or as surety. *Baker v. Robinson*, 63 N. C. 191.

If the plaintiffs looked to the defendants as accommodation indorsers, or as guarantors, then, as they purchased the note from the payee after maturity, they were not "*bona fide* holders before maturity," but had notice, as appeared upon the face of the paper, of its dishonor. Rev. Com. Paper, § 672; *Bank v. Lutterloh*, 95 N. C. 495; *Chaddock v. Vanness*, 35 N. J. 517.

So, whether by the one way or the other, the plaintiffs cannot hold the defendants liable. No error.

Affirmed.<sup>3</sup>

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<sup>3</sup> See *post*, Art. IX, Div. I, 1. See § 202, *post*. If an indorser reissue the paper after maturity without striking out his indorsement he remains liable and is estopped to require a new presentment and demand. *Williams v. Matthews*, 3 Cow. (N. Y.) 252; *St. John v. Roberts*, 31 N. Y. 441. — H.

[See also *Curtis v. Sprague*, 51 Cal. 239, *ante*, p. 144, and *Brooks, Oliphant & Co. v. Vannest*, 58 N. J. L. 162, *ante*, p. 276. — C.]



## ARTICLE V.

### RIGHTS OF HOLDER.

#### I. To sue and to receive payment.

§ 90

HAYS *v.* HATHORN.

74 NEW YORK, 486. — 1878.

ACTION on a promissory note alleged to have been made by defendants (Hathorn & Southgate), payable to the order of one of them (Frank H. Hathorn), and by him indorsed in blank and transferred to plaintiff. Judgment for plaintiff.

HAND, J. — In their answer, the defendants denied that the note on which the action was brought was ever transferred to the plaintiff or that he was the legal owner or holder thereof. They further denied that the plaintiff was the real party in interest; alleged that the Saratoga County Bank was the real party in interest and the owner and holder and should be the plaintiff, and that the note was duly transferred to it instead of to the plaintiff.<sup>1</sup>

Upon the trial, the plaintiff having produced the note which was payable to the order of F. H. Hathorn and indorsed in blank by him, rested. The defendants then offered to prove that the note "was not the property of the plaintiff, that the same was never transferred to him, that he was not the real party in interest, that the note was the property of the Savings Bank who is the real party in interest." The evidence was objected to by the plaintiff as immaterial and was excluded. This ruling I think was erroneous and renders necessary a reversal of the judgment.

Under the answer and this offer, the defendants unquestionably proposed to show substantially that the plaintiff had no title legal or equitable to the note, and no right as owner to its possession. This might have been done by proving that he was the mere finder or the unlawful possessor, or that the right to its possession and ownership was in the bank to whom they were liable thereon, or in some other way. This they had a right to show.

It may be that, had their offer been admitted, they would have pro-

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<sup>1</sup> "Every action must be prosecuted in the name of the real party in interest." N. Y. Code Civ. Proc., § 449. — H.

[See *Am. Soda Fountain Co. v. Hogue*, 17 N. Dak. 375, reported in 17 L. N. S. 1113, with note entitled "Holder of unindorsed note as real party in interest within meaning of statutes defining the parties by whom the action must be brought," continuing note on the same subject in 64 L. R. A. 581. — C.]

duced in fact no evidence to sustain it or prevent a recovery, but in considering the validity of their exception to the exclusion, we must assume that the evidence would have fully covered the propositions contained in the offer. And, as remarked in the dissenting opinion in the court below, "unless the defendants are to be precluded altogether from giving any evidence of a matter confessedly issuable, I do not see how this offer could be rejected."

The cases relied upon as justifying the exclusion of the evidence do not go that length. In *Cummings v. Morris* (25 N. Y. 625), it was held that the maker of a note could not defeat the plaintiff, not a payee, by proof that the consideration of the transfer to him was contingent upon his collecting the note. Such plaintiff was declared to be the real party in interest on the express ground that the transfer was complete and irrevocably vested in him the title to the note.

In *City Bank v. Perkins* (29 N. Y. 554), there was no question of exclusion of evidence, but all the circumstances being proved, it was held that where the cashier of a bank holding commercial paper, pledged it "duly indorsed" to the plaintiff as security for a loan by the plaintiff to his bank, and it had been actually transmitted under his direction to the plaintiff so indorsed, it was no defense to one admitting his liability upon such paper to show lack of authority in the cashier alone to contract a loan for the bank; or the fraudulent diversion by him of the funds received from the plaintiff on such loan. Some remarks in the opinion in that case, not necessary to the decision, are perhaps too broad to be entirely approved, but it is fully conceded in it that proof that the plaintiff had no right whatever to the possession but was a mere finder or had obtained it by some "positive breach of law" would be a defense.

*Brown v. Penfield* (36 N. Y. 473), holds merely that proof, by the party liable on a bill, of gross inadequacy of the consideration for the transfer of such bill to the plaintiff does not impeach the validity of such transfer as to the party so liable.

In *Allen v. Brown* (44 N. Y. 228), it was decided that, as against the plaintiff holding legal title to the claim by written assignment valid upon its face, the debtor cannot raise the question as to the consideration for such assignment or the equities between the assignor and assignee.

In *Eaton v. Alger* (47 N. Y. 345), the note being payable to bearer and produced by the plaintiff upon the trial, it was proved that the payee had delivered it to the plaintiff upon his undertaking to collect it at his own expense and pay to such payee upon its collection a certain sum of money. This was held to show sufficiently that the plaintiff, and not the payee, was the real party in interest under the Code.

*Sheridan v. The Mayor* (68 N. Y. 30), reiterates the doctrine that, as against the debtor, the plaintiff holding a written assignment of

the claim to himself valid on its face, obtained the legal title and was the real party in interest notwithstanding the fact that the assignment was without consideration and merely colorable as between him and the original claimant. Such assignment is expressly declared to protect the debtor paying the assignee against a subsequent suit by the assignor.

In *Gage v. Kendall* (15 Wend. 640), the fact that the prosecution of the note was *by its owner and holder* in the name of the plaintiff, a stranger to it, without his consent or knowledge, was sought to be set up as a defense, but it was ruled out on the ground that the nominal plaintiff need have no title to or interest in the paper sued upon. We apprehend the Code has changed this and that such facts would now be fatal to an action. Such a plaintiff could not in any view be the real party in interest. Indeed, he would not even have manual possession of the paper.

From this glance at the cases, it appears that it is ordinarily no defense to the party sued upon commercial paper, to show that the transfer under which the plaintiff holds it is without consideration or subject to equities between him and his assignor, or colorable and merely for the purpose of collection, or to secure a debt contracted by an agent without sufficient authority. It is sufficient to make the plaintiff the real party in interest, if he have the legal title either by written transfer or delivery, whatever may be the equities between him and his assignor.<sup>2</sup> But to be entitled to sue, he must now have the right of possession and ordinarily be the legal owner. Such ownership may be as equitable trustee, it may have been acquired without adequate consideration, but must be sufficient to protect the defendant upon a recovery against him from a subsequent action by the assignor.

As we understand the scope of the offer in the present case, it went to entirely disprove any ownership or interest whatever or even right to possession as owner in the plaintiff. It should therefore have been admitted. It may be true that the plaintiff, if this note had been delivered to him with the intent to transfer title, might have lawfully overwritten the blank indorsement with a transfer to himself; it is also true that the production of the paper by him was *prima facie* evidence that it had been delivered to him by the payee and that he had title to it, but the defendants' offer was precisely to

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<sup>2</sup> A transfer merely to enable the transferee to sue upon the instrument is valid. *Law v. Parnell*, 7 C. B. N. S. 282; *Wheeler v. Johnson*, 97 Mass. 39; *Boyd v. Corbitt*, 37 Mich. 52; *Beattie v. Lett*, 28 Mo. 596; *Bank v. Senior*, 11 R. I. 376; *Walker v. Wait*, 50 Vt. 668. If acting by authority of the beneficiary, such transferee is the real party in interest. The authority may be revoked. *Comstock v. Hoag*, 5 Wend. (N. Y.) 600; *Best v. Nokomis Bank*, 76 Ill. 608. — H.

rebut this very presumption, and for aught that we can know the evidence under it would have done so.

The judgment must be reversed, and a new trial ordered, costs to abide the event.

All concur, except MILLER and EARL, JJ., absent.

Judgment reversed.

## § 90

## GREENE v. McAULEY.

70 KANSAS, 601. — 1905.

MASON, J. \* \* \*

In jurisdictions where, as in Kansas (*Manley v. Park*, 68 Kan. 400;<sup>3</sup> *Graham v. Troth*, 69 Kan. 861), the holder of the naked legal title to a promissory note may sue upon it, even although he may be under obligation to account to some third person for the entire proceeds, it is often said that in such an action the defendant cannot challenge the plaintiff's right to maintain it, except by a showing of bad faith in the transaction (*Dyer v. Sebrell*, 135 Cal. 597, and cases cited; *City Bank of New Haven v. Perkins*, 29 N. Y. 554). But in the decisions there is a somewhat singular lack of explanation or illustration as to just what might be considered bad faith, in this connection. Doubtless the phrase is sometimes used with reference to a merely colorable transfer of title by the real owner to a stranger, had for the purpose of embarrassing the maker of the note in his defense. *Marvin v. Ellis*, (C. C.) 9 Fed. 367. But this example hardly meets the requirements of the situation, for it is also said that upon a showing that the plaintiff is only a nominal party, acting for the benefit of the real owner of the note sued upon, the defendant may avail himself of any defense that he could have interposed if he had been sued by the latter, and that his rights are protected, not by allowing him to question the plaintiff's capacity to sue, or by requiring the person finally interested to be made a party, but by permitting him to make his defense on the merits against the formal plaintiff. *Cottle v. Call*, 20 Iowa, 481; *Salem v. School District*, (C. C.) 125 Fed. 235; *Village of Kent v. Dana*, 100 Fed. 56; *Dickinson v. Bull*, 72 Ill. App. 75.

One instance of a transfer in bad faith is presented in *Sheldon v. Pruesser*, 52 Kan. 579, where its purpose was to defeat the taxation of the note involved. Another is suggested in *Sheridan v. Mayor*, 68 N. Y. 30, where it is said: "It is not a case of *mala fide* possession

<sup>3</sup> This case is reported in 1 A. & E. Ann. Cas. 832, with note entitled "Right of action thereon of nominal holder of promissory note."

See also the exhaustive note to *Stewart v. Price*, 64 Kan. 191 (overruled by *Manley v. Park*, *supra*), in 64 L. R. A. 581, entitled "Who is the real party in interest within the meaning of statutes defining the parties by whom an action must be brought." — C.

which the defendant can avail itself of, as if a thief should bring an action upon a promissory note which he had stolen." In *Daniel on Negotiable Instruments* (vol. 2, § 1191), it is said: "If it were shown that the plaintiff, upon suing upon a note payable to bearer or indorsed in blank, has no interest in it, and, in addition, that he is suing against the will of the party beneficially interested, he could not recover, as his conduct would be in bad faith." In support of this statement the author cites *Towne v. Wason*, 128 Mass. 517, the syllabus to which reads: "It is a good defense to a promissory note that the plaintiff, although in the possession of the note, has no interest in it, and is prosecuting the action, not for the benefit of the person beneficially interested, but against his objection."

But in that case the defense made was that the plaintiff had wrongfully, and without the consent of the owner, obtained possession of the note sued on, which was indorsed in blank; that he had no title to it, and never had had any; and that he was not authorized to sue in behalf of the owner — in effect, that he had stolen the note. And the ground of the decision was that under the facts stated the plaintiff had no authority to receive payment of the note, and a payment to him would not have released the maker. And this suggests what we conceive to be the true rule, of general if not of universal application — that, so far as affects the question of the right of the plaintiff to maintain the action, the only inquiry open to the defendant is whether the plaintiff had such title to the note that a payment made to him would be a complete protection to defendant from any further liability. *Sturgis v. Baker*, 43 Or. 236; *Brown v. Powers*, 53 App. Div. (N. Y.) 251; *Hays v. Hathorn*, 74 N. Y. 486. Any investigation which goes further than this merely involves questions between the plaintiff and other claimants of the note or its proceeds, and with these the defendant has no concern. It was said in *City Bank of New Haven v. Perkins*, 29 N. Y. 554: "The defendant claims no title to the paper, and does not pretend to have any interest in it, except as a promisor, liable to pay to any proper holder. There is no party before the court who has any legitimate interest in questioning the plaintiffs' title, or who has, as it seems to me, under the circumstances of this case, any right to be heard on that question. The defendant stands here, therefore, as a mere volunteer, in behalf of others not before the court, and who make no claim on their own account. \* \* \* It will be time enough to determine whether any other person has a better title, when such person shall come before the court to claim the bills in question, or their proceeds, from the plaintiffs."<sup>4</sup>

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<sup>4</sup> "It is the settled law of this commonwealth that a holder of a negotiable promissory note payable to bearer or payable to order and indorsed in blank can sue on it in his own name. *Little v. O'Brien*, 9 Mass. 423; *Beekman v. Wilson*, 9 Metc. 434; *Peaslee v. McLoon*, 16 Gray, 488; *Whitton v. Hayden*, 9

## II. Holder in due course.

### 1. REQUISITES TO CONSTITUTE HOLDER IN DUE COURSE.

#### (a) *Instrument must be complete and regular.*

§ 91 DAVIS SEWING MACHINE CO. v. BEST, 105 N. Y. 59. — 1887. Action to recover the value of certain notes diverted by plaintiff's president. At the time defendant purchased the notes they were complete and regular and signed by the plaintiff's treasurer, except that they were not signed by the president although a blank space with a diagonally ruled line, with the title of his office printed thereunder, was left at the foot of each instrument.

RUGER, Ch. J. — It is not seriously questioned, but that the notes were unlawfully converted by W., and that the plaintiff was entitled to recover their possession, unless the defendant became the *bona fide* holder thereof, by virtue of their purchase from the Security Bank. \* \* \*

The authorities seem to be consistent and uniform to the effect that the defendant cannot be considered such a holder.

The suggestion that a party issuing negotiable paper with blank spaces therein, apparently intended to be filled up to make a complete contract, impliedly authorizes its holder to insert appropriate words in such blanks, may be dismissed as inapplicable to such a case as this.

It has sometimes been held that a party signing such paper and delivering it to a third party unfilled by implication confers such authority, but it can hardly be claimed that one drawing the form of a promissory note which is unsigned, and falls into the hands of another, thereby authorizes the holder to attach the maker's signature or to add anything which is incomplete in its execution.

The rule that a party buying commercial paper which remains in some essential particular incomplete and imperfect, does not acquire the character of a *bona fide* holder, rests upon sound reasons and is well established in commercial law. No stronger evidence could be afforded that such paper had been prematurely put in circulation contrary to the will and intention of its maker, than the fact that it had not been fully and completely prepared, to perform the office for which it was designed. It is apparent that such paper must have been taken from the possession of its maker before an intention to part with it had been fully formed, and that he still designed to

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Allen, 408; *National Pemberton Bank v. Porter*, 125 Mass. 333, 28 Am. Rep. 235; *Spofford v. Norton*, 126 Mass. 533. It is not necessary for him to prove that he owns the note or if not that he has the consent of the true owner to bring suit on it in his own name." LOBING, J., in *Lowell v. Bickford*, 201 Mass. 543, 545. — C.

add some provision or formality to give it vitality and effect. It was said by the late Judge Folger in *Ledwich v. McKim* (53 N. Y. 307, 313), that "a negotiable instrument must be a complete and perfect instrument when it is issued, or there must be authority reposed in some one, afterwards to supply anything needed to make it perfect." The rule is also laid down in Daniel on Negotiable Instruments (§§ 841, 842).

We cannot, therefore, hold that the Trust Company [defendant] became the *bona fide* holder of the seven notes. \* \* \*<sup>5</sup>

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(b) *Instrument must not be overdue, etc.*<sup>6</sup>

### § 91 LE DUE v. FIRST NATIONAL BANK OF KASSON.

31 MINNESOTA, 33. — 1883.

MITCHELL, J. At Kasson, Minnesota, on the fifteenth of October, 1881, the plaintiff drew its draft or bill of exchange for \$500 on the Ninth National Bank of New York, payable on demand, to the order of plaintiff, and, for value, delivered the same to the payee, who, on the same day, indorsed it to one Edison, who held it until the eighth of March, 1882, without presentation for payment, and, on the day last named, indorsed it to one Jordan, who, on the eleventh of the same month, indorsed it to the Exchange Bank of Louisiana, Missouri, which caused it to be presented for payment on the fifteenth of the month, when payment was refused and the draft protested. On the fourth of April, the Exchange Bank transferred it to plaintiff. No explanation is given why Edison held the draft so long without presenting it for payment, nor does it appear that either Jordan or any of the subsequent indorsers asked for any explanation of this fact when they purchased it. In October, 1881, immediately after the draft in question had been transferred to him, Edison absconded from the state, leaving debts unpaid, among which was a promissory note for \$500 and interest, dated September 26, 1881, payable in thirty days to the order of defendant bank, and which it then held and still holds, and which has never been paid. About the first of November, 1881, the defendant, having ascertained that Edison was the owner

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<sup>5</sup> Followed in *Hunter v. Bacon*, 127 App. Div. (N. Y.) 572, the court saying that the Negotiable Instruments Law "is but a codification of the rule of the law merchant, which was that a party buying commercial paper which remains in some essential particular incomplete and imperfect does not acquire the character of a *bona fide* holder." — C.

<sup>6</sup> See *Y. M. C. A. Gymnasium Co. v. Rockford Nat. Bank*, 179 Ill. 599, reported in 46 L. R. A. 753, with exhaustive note entitled "Rights of holder of negotiable paper transferred after maturity." — C.

of the draft in question, notified the drawee not to pay it. This last fact is, perhaps, not material. Upon being sued upon the draft, the defendant now seeks to set off against it the promissory note against Edison already referred to, and the only question in the case is whether, under the facts stated, this can be done. It may be here remarked that La Due, the payee, was clearly discharged from liability as indorser, by the delay of five months in presenting the draft for payment; hence, he can claim no rights as an indorser who has been compelled to pay. His purchase of the draft from the Exchange Bank was a purely voluntary act, and he has now no greater rights under it than if he had never before been a party to the instrument.

According to the commercial law in England, and in probably all those states where a different rule has not been fixed by statute, an indorsee of an overdue bill or negotiable note takes it subject only to such equities or defenses as attached to the bill or note itself, and not to claims arising out of collateral matters or independent transactions, whether they arose against the payee or an immediate holder; the idea being that such commercial paper, although overdue, did not lose its negotiability.

Our state, following the example of many others, has by statute entirely changed this rule. Section 27, c. 66, Gen. St. 1878, provides: "In the case of an assignment of a thing in action, the action by the assignee is without prejudice to any set-off or other defense existing at the time of or before notice of the assignment; but this section does not apply to a negotiable note or bill of exchange transferred in good faith and upon good consideration before due." The effect of this statute, clearly, is to place an overdue bill or note upon the same footing as any other chose in action, and if it be assigned after due, a set-off to the amount of the note or draft may be made of any demand existing against any person who has assigned or transferred such note or bill after it became due, if the demand is such as might have been set off against the assignor while the note or bill belonged to him. A set-off arising out of an independent transaction against an intermediate holder is thus placed upon the same footing as an equity attaching to the bill or note itself against the original payee. This same rule is laid down in somewhat different language in the provision regarding set-off in justice's court. Section 40, c. 65, Gen. St. 1878. To illustrate, suppose Edison had been the payee, and had obtained the draft by fraud and without consideration, or had received payment on it while he owned it, but by oversight or mistake it remained in his hands. These would have been defenses attached to the draft itself, as between the original parties, and if the draft was overdue when Edison indorsed it to Jordan, defendant could have set them up even under the former rule against the draft in the hands of Jordan, or those to whom he subsequently transferred it.



But now, under the statute, defendant could set off this note, although it arises out of an independent matter, against an intermediate holder, because it is a demand which might have been set off against Edison while the draft belonged to him, had he sued on it. *Linn v. Rugg*, 19 Minn. 181 (Gil. 145); *Martin v. Pillsbury*, 23 Minn. 175; *Harris v. Burwell*, 65 N. C. 584. Such a rule may render precarious the business of dealing in overdue paper, especially when it has passed after maturity through the hands of several holders. The policy of such a law is exclusively for the Legislature, but we may suggest that we see no reason why overdue commercial paper should not be placed on the same footing as any other chose in action. Notes and bills of exchange are only treated as business paper when negotiated before maturity. When overdue they are dishonored. In the principal commercial states of the Union, such as New York,<sup>7</sup> this same rule has long been established by statute. Hence our state cannot be charged with having adopted a rule in opposition to the judgment or usages of the business world.<sup>8</sup>

The only question left, then, is whether this draft was "overdue" when Edison indorsed it to Jordan on the eighth of March, 1882, four months and twenty-three days after its date. In the case of a bill, note, or check, payable on demand, no exact day of payment is fixed in the instrument. The general rule is that it must be pre-

<sup>7</sup> See N. Y. Code of Civil Procedure, § 502. — C.

<sup>8</sup> On this point Mr. Crawford says: "It was not deemed expedient to make provision in the Negotiable Instruments Law as to what equities the transferee will be subject to; for the matter may be affected by the statutes of the various states relating to set-off and counterclaim. In an act designed to be uniform in the various states, no more can be done than fix the rights of holders in due course. On the question whether only such equities may be asserted as attach to the paper, or whether equities arising out of collateral matters may also be asserted, the decisions are conflicting. In England it was decided in *Burroughs v. Moss*, 10 Barn. & Cress. 558, that the indorsee of an overdue bill is liable to such equities only as attach to the bill or note itself, and not to claims arising out of collateral matters, such as a general set-off is. This is a leading case, and has since been uniformly followed in that country." Crawford's Neg. Inst. Law, 3d ed., p. 76.

In *Edney v. Willis*, 23 Neb. 56, at p. 61, MAXWELL, J., says: "Section 31 of the code provides that 'In the case of an assignment of a thing in action, the action by the assignee shall be without prejudice to any set-off or other defense now allowed; but this section shall not apply to negotiable bonds, promissory notes, or bills of exchange, transferred in good faith and upon good consideration, before due.' This clearly implies that set-off may be allowed against a note transferred after due. . . . The English rule seems to be based upon the doctrine of recoupment, and is not applicable in any state having a statute similar to our own, where independent and collateral claims may be set off against an overdue note in the hands of a payee."

For a very instructive and learned discussion of this matter, see *Cumberland Bank v. Hann*, 18 N. J. L. 222. See also *Davis v. Miller*, 14 Gratt. (Va.) 1. — C.

sented for payment within a reasonable time, having in view ordinary business usages, and the purposes which paper of that class is intended to subserve.

The term "overdue," as applied to a demand bill of exchange, is used in different connections, in each of which it has a different meaning; and the failure to keep these distinctions in mind, has perhaps led to some misapprehension regarding the present case. Sometimes it is used in reference to a right of action against drawer or indorser. In that connection a bill is not overdue until presented to the drawee for payment, and payment refused. Sometimes the term is used in considering whether an indorser has been released by a failure of the holder to present the bill for payment, and to give the indorser notice of its dishonor within a reasonable time.

Again, the term is applied to a bill which has come into the hands of an indorser so long after its issue as to charge him with notice of its dishonor, and thus subject it in his hands to the defenses which the drawer had against it in the hands of the assignor. It is in this last connection that the term "overdue" is considered in the present case. That in this case a bill may be said to be overdue, although it has never been in fact presented to the drawee for payment, is recognized everywhere throughout the books, and will be apparent, we think, on a moment's reflection. Suppose a draft has been held by the payee five years, without ever having been presented to the drawee for payment, and is then indorsed to another party. It would not be due so as to give a right of action against the drawer, because his contract is only to pay in case it is not paid by the drawee on presentation. But there would be no doubt that it would be overdue or dishonored, so as to charge it in the hands of the indorsee with any defenses which the drawer had against it in the hands of the payee, although, when he took it, it had never been presented for payment. The retention of a demand draft so long a time without presentment, when no defense exists against it, is so unusual and contrary to business usages that this circumstance would be held to charge the indorsee with notice when he purchased the draft that it was dishonored. The lapse of time would in such case be so great as to put a purchaser upon inquiry as to the reason why it was still outstanding and unpaid.

The cases are almost innumerable in which it has been held that, paper payable on demand had been outstanding so long, when transferred, as to be deemed overdue and dishonored, so as to subject it, in the hands of the purchaser, to any defenses which the maker or drawer had against it in the hands of the payee; and in none of these cases is the question whether or not the paper had been, before the transfer, presented for payment to the maker or drawee, referred to as at all material. *Down v. Halling*, 4 Barn. & C. 330; *First Nat. Bank of Newton v. Needham*, 29 Iowa, 249; *Cowing v. Altman*, 71 N. Y. 435; *Sylvester v. Crapo*, 15 Pick. 92; *Ranger v. Carey*, 1 Metc. 369; *Her-*

*rick v. Woolverton*, 41 N. Y. 581; Story, Prom. Notes, § 207 and note; *Thompson v. Hale*, 6 Pick. 258; *American Bank v. Jenness*, 2 Mete. 288; *Carlton v. Bailey*, 27 N. H. 230; *Parker v. Tuttle*, 44 Me. 459; *Nevins v. Townsend*, 6 Conn. 5; *Camp v. Scott*, 14 Vt. 387; *Morey v. Wakefield*, 41 Vt. 24. That in determining whether an indorsee took a demand note or bill as dishonored and overdue paper, subject to all equities or defenses, the test is the length of time it has been outstanding, and not whether it has in fact been presented for payment, may be illustrated in another way. Suppose a draft had in fact been presented for payment, and payment refused on the very day it was issued, it would then be overdue as to the drawer, so that an action would then lie against him. But suppose immediately after such presentation, and on the same day, the holder should indorse the draft to another, who took it in good faith for value, without notice of this actual dishonor, clearly such indorsee would not take it as overdue paper, subject to the equities or defenses against it in the hands of the former holder, because, a reasonable time for its presentation not having expired, there was nothing to put him upon inquiry, or to charge him with notice of such equities. *Himmelman v. Hotaling*, 40 Cal. 111. In fact, in determining whether an indorsee takes such paper as overdue paper, subject to such defenses or equities, the question of actual demand and dishonor does not enter into the discussion. The point of inquiry is, had the paper been outstanding so long after its date as to put the purchaser upon inquiry, and charge him with notice that there is some defense to it? In view of the well-known fact that bills of exchange are not always transmitted immediately for payment, but first pass through the hands of several intermediate holders in the ordinary course of business, and in other cases are purchased by travelers to be carried with them instead of currency or coin, to be negotiated as occasion may require, we are not disposed to lay down any narrow rule on this subject. But in this case we think that the fact that this draft was, without any explanation of the reason, found outstanding nearly five months after its date, fully justified the trial court in holding it overdue and dishonored when Jordan took it, so as to charge it in his hands, or the hands of those who hold under him, with any defense or set-off which the drawer had against it in the hands of Edison.

Order denying new trial affirmed.

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§ 91

GARDNER *v.* BEACON TRUST COMPANY.

190 MASSACHUSETTS, 27. — 1906.

MORTON, J. — This is a bill in equity brought by the plaintiff, a minor, by her next friend and guardian, to compel the defendant the Beacon Trust Company to assign and deliver to her a mortgage and

the note thereby secured, alleged to have been fraudulently obtained from the plaintiff's guardian by one Edwin M. Thayer, since deceased, and fraudulently assigned by him to the trust company. As to certain of the defendants the bill was dismissed, and a decree was entered in favor of the plaintiff against the trust company and other defendants. The case is here on appeal by the trust company. All of the evidence is reported.

Briefly stated the facts are as follows: In January, 1903, the plaintiff was the owner of a mortgage and the note thereby secured for \$1,500, on land in Quincy, given by the defendant Brown to one Hattie E. Carr and transferred by successive assignments to the plaintiff. Her mother, Mary E. Gardner, now Mary E. Wales, was her guardian. The note and mortgage had been long overdue. By means of fraudulent misrepresentations that the owner of the equity wished to pay off the mortgage, Thayer obtained from the plaintiff's guardian an assignment of the note and mortgage to himself, and subsequently assigned them to the trust company as security for a note of \$2,000 for money borrowed by him of the company. The trust company took the assignment in good faith, for value, and without any notice of Thayer's fraud, or of any defect in his title, unless the fact that it took them when overdue constituted such notice.

We assume, in favor of the plaintiff, that the fact that the note was secured by mortgage does not affect its character as an overdue negotiable instrument when taken by the trust company, although it is said in *Murphy v. Barnard*, 162 Mass. 72, 75, that there is a distinction between the purchase of ordinary commercial paper and that of notes known to be secured by a mortgage of real estate, though bought as negotiable paper. See *Fish v. French*, 15 Gray, 520; *Vinton v. King*, 4 Allen, 562; *Willcox v. Foster*, 132 Mass. 320; *Bacon v. Abbott*, 137 Mass. 397. But the note did not cease to be property or to be negotiable because overdue. *Baxter v. Little*, 6 Metc. (Mass.) 7; *Fisher v. Leland*, 4 Cush. 456, 458; *Leavitt v. Putnam*, 3 N. Y. 494. And the question is whether, assuming for the moment the validity of the transfer by the plaintiff's guardian to Thayer, which will be considered later, the fact that the note and mortgage were overdue when the trust company took them so affected their title as to postpone their right to that of the defrauded owner. The general rule is thus stated by Lord Herschel in *London Joint Stock Bank v. Simmons* (1892) A. C. 201, 215: "The general rule of law is, that where a person has obtained the property of another from one who is dealing with it without the authority of the true owner, no title is acquired as against that owner, even though full value be given, and the property be taken in the belief that an unquestionable title is being obtained, unless the person taking it can show that the true owner has so acted as to mislead him into the belief that the person dealing with the property had authority to do so. If this can be

shown, a good title is acquired by personal estoppel against the true owner." He then goes on to say that there is an exception in the case of negotiable instruments, manifestly meaning those not yet due, and that as to them any person in possession of them can convey a good title, even if acting in fraud of the true owner. This is the only exception mentioned by him to the general rule which he lays down, and which would seem, therefore, to have been regarded by him as applying to overdue negotiable notes as well as to other property when circumstances brought them within it. Applying the rule thus laid down, or the rule that, where one of two innocent persons must suffer in consequence of the fraud of another, the loss must fall upon the one who, by his trust and confidence, has enabled the perpetrator of the fraud to commit it (*Easter et al. v. Allen*, 8 Allen, 7; *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325), it would seem plain that the loss in this case should fall upon the plaintiff, unless the fact that the note and mortgage were overdue makes a difference. She had assigned the note and mortgage to Thayer by an instrument valid upon its face, and had delivered possession of them to him. As a consequence of her conduct, he had possession of them as apparent owner, with full dominion over the property which they represented. This apparent ownership was obtained from the guardian by Thayer's fraud, it is true; but, although that would have enabled her to avoid the transaction as between her and him so long as the note and mortgage remained in his hands, his apparent ownership was not affected thereby.

Does, then, the fact that the note and mortgage were overdue when the trust company took them, make a difference? The purchaser of an overdue negotiable note takes it subject to all the equities, if any, that are attached to it at the time of the transfer in favor of the maker, the owner, or of third parties. *Vinton v. King*, 4 Allen, 562; *Vermilye & Co. v. Adams Express Co.*, 21 Wall. 138; *In re European Bank, Ex parte Oriental Commercial Bank* (1870) 5 Ch. App. 358; *In re Overend, Gurney & Co., Ex parte Swan* (1868) 6 Eq. 344. If there are no equities attached to the note the purchaser gets as good a title after as before maturity. *In re Overend, Gurney & Co., Ex parte Swan, supra*. And it makes no difference that the note is dishonored. If there are equities attached to it, he takes it subject to them. This is what is meant when it is said that the purchaser has no better title, legal or equitable, than his transferor had, and that the note is subject in his hands to the same infirmities of title as against the true owner, and to the same defenses as against the maker, that it was subject to in the hands of his transferor. 1 Daniel on Negotiable Instruments (3d ed.) §§ 72-74, *et seq.* If, for instance, an overdue note is stolen from the owner, a subsequent purchaser acquires no title as against the true owner (*Vermilye & Co. v. Adams Express Co., supra*), or if an overdue note has been paid by

the maker, and is fraudulently put in circulation by the payee, a purchaser, though for value and in good faith, takes it subject to the defense of payment by the maker. In such a case the very fact that the note is dishonored is sufficient to put the purchaser upon inquiry as against the maker. *Gold v. Eddy*, 1 Mass. 1; *Brown v. Davis*, 3 T. R. 80; *Losee v. Dunkin*, 7 Johns. 70. But the case is very different where the owner of an overdue note transfers it, under circumstances which enable his transferee to deal with it, though obtained by fraud, as if he were the true owner, and when an innocent purchaser for value takes it from such transferee before the transfer has been avoided. In such a case no equity attaches to the note in favor of the true owner as against the innocent purchaser for value, since it was by his own act that the perpetrator of the fraud was enabled to commit it. The true owner of an overdue note may deal with it as with any other property, and the mere fact that the note is overdue does not, in such a case, in the absence of anything in the transaction to suggest suspicion, put a purchaser upon inquiry any more than a purchaser is bound in any other case to inquire into the title of his vendor. See *White v. Dodge*, 187 Mass. 449. The possibility that the title may have been obtained by fraud exists in all cases; but that is not enough to put a purchaser upon inquiry. Any other view would put upon the innocent purchaser for value of overdue negotiable paper the onus of a defective title, no matter how much he may have been misled by the conduct of the true owner. We do not think that such is the law. *Cochran v. Stewart*, 21 Minn. 435, 438, 440; *Moore v. Moore*, 112 Ind. 149; *Neuhoff v. O'Reilly*, 93 Mo. 164; *Etheridge v. Gallagher*, 55 Miss. 458; *Connell v. Bliss*, 52 Me. 476; *Eversole v. Maull*, 50 Md. 95; 1 Jones on Mortgages (3d ed.) § 84; Ames Cases on Trusts (2d ed.) p. 310. In *Foley v. Smith*, 6 Wall. 492, the above principle was recognized, though it was held that the facts did not bring the case within it. So far, therefore, as the plaintiff relies upon the fact that the note and mortgage were overdue when taken by the trust company, her contention must fail. The note being dated before January 1, 1899, the Negotiable Instruments Act does not apply. See Rev. Laws, c. 73, § 211. \* \* \*

The result is that so much of the decree as adjudges that the mortgage remains and still is the property of the plaintiff, and orders the trust company to assign and convey its interest in the same to her, is reversed, and the rest is affirmed.

So ordered.<sup>9</sup>

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<sup>9</sup> See the very careful notes to this case in 2 L. N. S. 767, and in 5 A. & E. Ann. Cas. 583, analyzing the authorities and pointing out the distinctions necessary to be grasped in order properly to understand the authorities. It is recognized, however, that it may not be possible to harmonize all the cases. — C.

## § 91

## CHESTER v. DORR.

41 NEW YORK, 279. — 1869.

ACTION against indorser, of eight notes, each in the following form:  
\$500.00. NORTHFIELD, January 15th, 1858.

Eight months after date, we promise to pay to the order of James A. Dorr,  
five hundred dollars, at No. 34 Pine street, New York City.

THE NORTHFIELD BRICK COMPANY,  
By JAMES A. DORR, *Treasurer*.

[Indorsed]: Protest waived,  
JAMES A. DORR.

Dorr indorsed the notes solely for the accommodation of one Myers, a creditor of the brick company, and without consideration. Some two or three years after the maturity and dishonor of the notes Myers transferred them to plaintiff.

WOODRUFF, J. — Mr. Justice Story, in his treatise on Promissory Notes (section 178), thus states the difference between the legal effect of the transfer of a promissory note, before and after maturity:

“If the transfer is made before the maturity of the note, to a *bona fide* holder, for a valuable consideration, he will take it free of all equities between the antecedent parties, of which he has no notice.

“If the transfer is after the maturity of the note, the holder takes it as a dishonored note, and is affected by all the equities between the original parties, whether he has any notice thereof or not. But, \* \* \* it is not to be understood by this expression, that all sorts of equities existing between the parties, from other independent transactions between them, are intended; but only such equities as attach to the particular note, and as between those parties, would be available to control, qualify or extinguish any rights arising thereon.”

The learned author gives this as the final conclusion, from the numerous cases cited by him, an examination of which shows, that it is only after some difference of opinion that it has come to be deemed settled. Or, as Mr. Chitty says, of the opinion of Buller and Ashhurst, JJ., in *Brown v. Davis* (3 T. R. 80), expressed, when Lord Kenyon doubted its broad extent, “this latter opinion is now the law.” That opinion was to the effect:

“That where a note is overdue, that alone is such a suspicious circumstance, as makes it incumbent on the party receiving it, to satisfy himself that it is a good one, otherwise much mischief might arise.” “If a note indorsed, be not due at the time, it carries no suspicion whatever on the face of it, and the party receives it on its own intrinsic credit. But if it is overdue, though I do not say that, by law, it is not negotiable, yet, certainly it is out of the common course of dealing, and does give rise to suspicion. \* \* \* Generally, when a note is due, the party receiving it, takes it on the credit of the person who gives it to him.”

The foundation of the rule, which distinguishes commercial paper from ordinary common-law choses in action, is in harmony with the law thus stated; the holder of the former is protected against any inquiry into its previous history, and is warranted in giving it full faith, according to its tenor, because commercial convenience and the importance of the free and unembarrassed use of commercial credits required it; and on this, the mercantile customs, which ripened into the law merchant, were founded. These reasons, however, could have no application to paper which had been dishonored. The credit it was adopted to invite is spent, and the very fact of dishonor is inconsistent with the purposes which the rule was intended to subserve.

The rule is simple and convenient of application, is in no sense inconsistent with the usefulness of negotiable paper for the purposes for which it is intended, and, as it seems to me, is a just security against mischief and fraud.

In the terms in which it is above stated it includes the defense of want of consideration, whenever that renders the note invalid in the hands of him who holds it, when it becomes due. Such want of consideration is an inherent defect in the contract itself. Or, in the language of the rule, attaches to the note itself, in the hands of one for whose accommodation a note is made, and does not, like a set-off or other collateral matter apart from the note, arise out of an independent transaction.

But the same learned writer, above referred to, states that the mere fact that an accommodation note has been indorsed after it became due, does not of itself, without some other equity in the maker, defeat a recovery by the indorsee. (Story, § 194.) And Mr. Chitty states that it has been so decided. The cases of *Charles v. Marsden* (1 Taunt. 224); *Sturtevant v. Ford* (4 Man. & Gr. 101); 4 Scott, 608, and *Caruthers v. West* (11 Q. B. 143), are in support of the proposition.

These are the cases upon the authority of which the present case was decided below.

I am constrained to say that I am not satisfied that such an exception to the rule is either just or called for by any principle, nor am I at all convinced by the reasons assigned for the exception.

That the maker or indorser of a note for the accommodation of another should be held to the terms of his own indorsement according to their just interpretation, I fully agree. That one who receives such paper before maturity, should not be affected by the mere fact that it was made or indorsed without consideration, I equally agree. That when a party lends his note or indorsement to another without restriction as to its use, he authorized the negotiation thereof in any manner which may serve the convenience of credit of the borrower, may be conceded.



From this latter concession it is argued, that such a lending of one's name is furnishing a continuing guarantee of the payment of the note, irrespective of its terms as to time of payment, and is therefore binding whenever it is transferred, and however long after it has become payable and been dishonored. That the absence of express restriction warrants the inference, that the making or indorsement was to enable the borrower to use it whenever thereafter it suited his pleasure, and so "enforcing its payment is in accordance with the object for which the note was, as matter of accommodation, made or indorsed;" and in the discussion in England, it has been suggested, that supposing an accommodation acceptance to remain in the hands of the party accommodated, it may be treated as giving authority by implication to use it thereafter, as his convenience or needs may require.

In respect to the last suggestion, two observations are pertinent; first, it begs the question, for assuming the rule to be that he who receives the note or bill, after dishonor, acquires no better title to recover thereon than he has from whom it was received, then there is no reason why the accommodation maker or indorser should not treat the note in the hands of the borrower, after maturity, as *functus officio*, and mere waste paper. And, second, how is the maker or indorser, in such case, to withdraw his note or indorsement? Is he to be driven into a court of equity, and to praying out an injunction, to prevent a subsequent transfer? I think not. Take the present case; the note itself was the property of the holder at maturity (Myers), and was a valid note in his favor against the maker. The indorsement of the defendant (the appellant's testator) was material as a transfer of title, although, being made for Myers' accommodation, it could not be enforced against such defendant as indorser. I cannot agree that it was incumbent on the defendant to go into a court of chancery to compel Myers to suffer a writing of the words, "without recourse," or an equivalent expression, as a qualification of such indorsement.

As to the other reason, it is even less satisfactory, because it proceeds, I think, upon an entire misconstruction of the act of making or indorsing a note for the accommodation of another. Its purpose and object, is to obtain credit for such other, or to enable him to do so. The very terms of the note declare the credit it is intended to procure, that is to say, until the maturity of the note. Within that range, the making or indorsement being unrestricted as to its use, the borrower may use it as his exigencies require, and a transferee may receive it in reliance upon the undertaking which is imported by its terms.

But the very term of payment, contained in the note, imports that the accommodation party undertakes that the note shall be paid *at its maturity*; and that he who then holds the note, shall have recourse

to him, if it be not *then* paid. Where the accommodation (as in the present case) is by indorsement, that is the precise contract, viz., that the note shall be paid at maturity, and not that it shall be paid at any *future time*. If the note be not paid at maturity, the contract is broken, and if he who then holds it can recover thereon, then his right of recovery may be transferred to another; and the recovery of the latter will be, not because the accommodation indorser undertook that the note should be paid to him, or should be paid at some date after it was due, but because a valid cause of action, existing in favor of the holder at maturity, has been transferred to him.

It is not according to the intent or meaning of an indorsement for another's accommodation, to say that the indorser intends to give the use of his credit for any other period than that limited in the note; or that such an indorsement imports authority to use it, when that period has elapsed.

One may be willing by indorsement, to guarantee the solvency of another for sixty days, or for six months, and yet he would wholly refuse to do so for a period of two years. And accordingly, when such accommodation is given, it is a most material circumstance that the time during which the borrower is at liberty to obtain credit on the note, is fixed by the limitation of the time of payment therein.

I deem the just view of the subject to be, that when a note has become due and is dishonored, the rights and responsibilities of the parties thereto are fixed. The note then loses the chief attribute of commercial paper. It is no longer adapted to the uses and purposes for which such paper is made, and in respect of which it is important that it should circulate freely. And thereafter, he who takes, it, takes it with knowledge of its dishonor, with obvious reason to believe that there exists some reason why it was not paid to the holder; and takes it with just such right to enforce it as such holder himself has, and no other.

In thus stating my views, I am not insensible of the apparent authority for the decision made below, but I am also aware that the judges in England have not been at all agreed upon the subject, and have expressed doubt of the correctness of the decision in *Charles v. Marsden*, upon which the other two cases above referred to were decided. The cases, largely collected in the notes to Chitty in the recent edition, warrant, I think, the dissatisfaction I have expressed.

No case in this state has called for a decision of the question; and yet in *Brown v. Mott* (7 J. R. 361), and in *Grant v. Ellicott* (7 Wend. 227), the case of *Charles v. Marsden* is referred to without disapprobation, and the proposition to be derived therefrom is stated; but in neither case was the point now raised before the court, for in neither did it appear, that the plaintiff took the note after it became due.

And that in other states in this country, such an exception to the general rule first above stated is repudiated, see *Brown v. Hastings*

(36 Penn. 285); *Britton v. Bishop* (11 Vt. 70); *Odiorne v. Howard* (10 N. H. 343); *Cummings v. Little* (45 Maine, 183); *Vinton v. King* (86 Mass. & Allen, 563); *Kellogg v. Barton* (94 Mass. 12 Allen, 527). And the general proposition, that he who takes a note when overdue, takes it subject to all defenses inherent in the note, or arising out of any agreement with the holder, expressed or implied, and relating thereto, or in another form, that such an indorsee obtains no greater or other rights than his indorser had in it at the time of the indorsement, has been stated as law in cases almost without number. It will, perhaps, suffice to refer to two from the Supreme Court of the United States. *Andrews v. Pond* (13 Pet. 79), says of the indorsee of a dishonored bill: "If he chooses to receive it, he takes it with all the infirmities belonging to it; and is in no better condition than the person from whom he received it." (*Fowler v. Brantley*, 14 Pet. 321.) "A note overdue or bill dishonored is a circumstance of suspicion to put those dealing for it afterward on their guard, and in whose hands it is open to the same defenses it was in the hands of the holder when it fell due. After maturity, such paper cannot be negotiable 'in the due course of trade,' although still assignable." See also *Foley v. Smith* (6 Wallace, 492.)

In my own opinion, the just rule, and the rule resting on the soundest principle, requires us to reverse. The supposed exception to the general rule rests on neither reason, nor as I think on authority, certainly not in this country.

It was suggested by the counsel for the respondent, that as matter of fact, the defendant's indorsement was not without consideration, and for the accommodation of Myers, who held the note at maturity.

The finding of the referee on that subject is conclusive in this court; and that finding is, that the indorsement was made without consideration at Myers' request, and to enable Myers to use the notes. This is but a statement that the defendant indorsed the notes for the accommodation of Myers. It was so treated in the court below, and it is an unwarranted assumption to say, that possibly the defendant had some other inducement to indorse the notes, in order that the plaintiff might accept the notes, and give credit to the maker thereof, who was his debtor.

MURRAY, J., also read an opinion for reversal.

GROVER, LOTT, JAMES and DANIELS, JJ., concurred for reversal.

MASON, J., thought the law settled in this State in favor of the plaintiff, by the cases (7 Johns. 361; 7 Wend. 227; and 1 Hill, 513), and was for affirmance.

HUNT, Ch. J., was also for affirmance. He did not approve of construing the defendants' contract as conditioned upon transfer before due.

Judgment reversed.

## MARLING v. JONES.

138 WISCONSIN, 82. — 1909.

TIMLIN, J. \* \* \*

The accommodation note in question was transferred by the party accommodated, namely, the payee therein, after it became due. Does this circumstance permit the accommodation maker to avoid the note on the ground that he received no consideration? If the effect of a transfer, after due, is merely to leave the transferee subject to notice or knowledge of the true circumstances attending the execution of the note in question, and for this reason subject him to defenses, then, as actual knowledge that the note was accommodation paper would be no defense by the accommodation maker as against the transferee for value from the party accommodated, it would seem that it could make no difference in the liability of the accommodation maker upon this ground whether the note was transferred before or after due. Aside from this imputed notice or knowledge, or actual notice or knowledge, it is not true that the taker for value from the party accommodated stands in the shoes of the latter. The difference between them is that one has parted with value for the note and the other has not. In neither case has the maker received a consideration moving to him. So that between the party accommodated and the accommodation maker there is no consideration parted with or received by either, while between the transferee for value and the accommodation maker there is a consideration moving from the former at the instance of the latter sufficient to support the contract. There is considerable conflict among the decisions on this point, and those text-writers who profess to have made a thorough examination of the cases seem to incline to the belief that the weight of authority upholds the view that the transferee of accommodation paper after due may enforce the same against the accommodation maker. Joyce on Defenses to Commercial Paper, § 282; 1 Dan. Neg. Instruments (5th ed.) § 726; 2 Randolph, Comm. Paper (2d ed.) § 677; Story, Prom. Notes (7th ed.) § 194; 2 Parsons, Notes & Bills, p. 29; *Mersick v. Alderman*,<sup>10</sup> 77 Conn. 634; *Black v. Tarbell*, 89 Wis. 390; 1 Am. & Eng. Ency. Law, 364.

The uniform Negotiable Instruments Law (Sanborn's St. Supp. 1906, §§ 1675-1684-7) enacted by the Legislature of this state, and in like manner adopted by thirty-four states of the Union, and by Congress for the District of Columbia, in the effort to bring about more uniformity of decision regarding these instruments of commerce, appears to distinguish between a holder for value and a holder in due course. Brannan on the Negotiable Instruments Law (A. D. 1908);

<sup>10</sup> This case is reported in 2 A. & E. Ann. Cas. 254, with note entitled "Right of transferee of accommodated party after maturity as against accommodation party." — C.

Bunker on the Negotiable Instruments Law (A. D. 1905). Section 1675-55,<sup>11</sup> Sanborn's St. Supp. 1906 to St. 1898, defines who is an accommodation party, and provides that such party is liable on an instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party. Section 1675,<sup>1</sup> Sanborn's St. Supp. 1906, defines "holder" to mean the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof, and defines "value" to mean a valuable consideration. On the other hand, a holder in due course is defined in section 1676-22; Sanborn's St. Supp. 1906<sup>2</sup> [giving substance of this section.]

In the hands of a holder otherwise than in due course such note is subject to the same defenses as if the notes were not negotiable. Section 1676-28,<sup>3</sup> Sanborn's St. Supp. 1906. A negotiable instrument is discharged by the payment in due course by the party accommodated. It is not discharged by payment by a party secondarily liable thereon, but remits such party to his rights against him primarily liable (section 1679-2,<sup>4</sup> Sanborn's St. Supp. 1906), except where it is made for accommodation and paid by the party accommodated (Id.). On the other hand, there are the cases of *Chester v. Dorr*, 41 N. Y. 279; *Peale v. Addicks*, 174 Pa. 543; *Bacon v. Harris*, 15 R. I. 599; *Battle v. Weems*, 44 Ala. 105, and *Simons v. Morris*, 53 Mich. 155. See, however, in Alabama, the later case of *Connerly v. Planters' & Mer. Ins. Co.*, 66 Ala. 432; in Michigan the later case of *Warder et al. v. Gibbs*, 92 Mich. 29.

No doubt there exists a class of defenses in favor of the accommodation maker of negotiable paper which may not be urged in cases where the note is fair on its face and negotiated in due course before due to a purchaser for value, without notice or knowledge of any infirmity, but which might be urged in favor of the accommodation maker if the note were overdue when negotiated, but the fact that the accommodation maker received no consideration is not one of these defenses, so long as the note was negotiated by his express or implied authority. The fact is here established that this note was in its inception accommodation paper. Jones made to Herman no express restriction upon its use for that purpose. We do not overlook the testimony of Brand with reference to conversations between him and Herman not in behalf of Jones, which the court below from its findings must have rejected as incredible. We approve this rejection. The testimony is overborne by the circumstantial evidence. It is a question

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<sup>11</sup> N. Y., § 55. — C.

<sup>1</sup> N. Y., § 2. — C.

<sup>2</sup> N. Y., § 91. — C.

<sup>3</sup> N. Y., § 97. — C.

<sup>4</sup> N. Y., § 202. — C.

upon which the precedents are at some variance whether or not the agency of the party accommodated to use the accommodation paper to raise money thereon (no express agreement appearing) expires with the maturity of the paper. The greater number of courts seem to favor the view that the agency to negotiate an accommodation paper and raise money thereon is not so limited. See citations *supra*.

The courts of this state are not yet committed upon the question presented, and it seems more in harmony with the uniform Negotiable Instruments Law, and with the weight of judicial authority, to hold, as we do, that the mere fact that the accommodation note was transferred by the party accommodated after due to a holder for value does not permit the accommodation maker to defeat recovery at the suit of the holder for value merely upon the ground that the note was an accommodation note, and without consideration moving to the accommodation maker. This necessitates a modification of the judgment of the court below so as to permit the appellant to take judgment against the accommodation maker, Jones.<sup>5</sup>

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## § 91 FIRST NATIONAL BANK OF WAVERLY, IOWA, v. FORSYTH.

67 MINNESOTA, 257. — 1897.

JUDGMENT for defendants. From an order refusing a new trial, plaintiff appeals.

MITCHELL, J. The only question presented by this record is whether the promissory note in suit was dishonored paper at the time it was indorsed to the plaintiff, and therefore subject, in its hands, to defenses existing between the original parties. The note was executed April 4, 1891, and was payable July 1, 1894, with interest payable annually. The court finds that it was indorsed to the plaintiff on the 22d of May, 1894; that on that day the plaintiff paid for it \$243; that at that time there was interest overdue and unpaid on the note; and that that fact was known to the plaintiff at the time of the purchase. The evidence amply sustains these findings. No interest had ever been paid, and hence there were, at the time of the purchase, two yearly installments of interest overdue and unpaid. The sum which was paid for the paper fully justified the court in finding that the plaintiff knew of this default. Therefore the case is not distinguishable from *Bank v. Scott Co.*, 14 Minn. 77 (Gil. 59). We are asked, however, to overrule that case, for the reason that it stands

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<sup>5</sup> See also *Naef v. Potter*, 226 Ill. 628, reported in 11 L. N. S. 1034, with note entitled "Effect of transfer, after maturity, of accommodation paper which has been diverted from the use for which it was intended by the accommodating party." — C.

alone, and is contrary to the uniform current of authorities in other jurisdictions. If this was true, it would probably be sufficient reason for overruling the case, because uniformity is eminently desirable in rules governing negotiable paper.

All the authorities agree that, when the principal of a note is payable by installments, and one installment is overdue and unpaid at the time the paper is indorsed and transferred, the whole paper is dishonored, and subject to all equities between the original parties. Whether or not the same rule applies when there is an installment of interest overdue is a controverted question — at least, the authorities are not all agreed on it. The cases holding, either directly or impliedly, that the indorsee for value of negotiable paper is within the protection of the law merchant, although interest is overdue and unpaid at the time of purchase, are the following: *Bank v. Kirby*, 108 Mass. 497; *Cromwell v. County of Sac*, 96 U. S. 51; *Kelley v. Whitney*, 45 Wis. 110; *State v. Cobb*, 64 Ala. 127; *Brooks v. Mitchell*, 9 Mees. & W. 15. The first three are the only cases in which the question is discussed, and of these the last two adopt substantially the line of reasoning used in *Bank v. Kirby*. Among the text writers Daniels, Bigelow, and Tiedeman favor this rule. The Supreme Court of Wisconsin had held the same way in *Boss v. Hewitt*, 15 Wis. 260, but held differently, or at least expressed different views, in *Hart v. Stickney*, 41 Wis. 630, but finally overruled this dictum in *Kelley v. Whitney*, *supra*. The authorities on the other side of the question are *Newell v. Gregg*, 51 Barb. 263; *Bank v. Scott Co.*, *supra*, and *Chouteau v. Allen*, 70 Mo. 290–339. While *Newell v. Gregg* is not the decision of a court of last resort, we do not find that it has ever been overruled in the state of New York, or that the Court of Appeals of that state has ever passed upon the question.\* These are all the cases we have been able to find on either side. The line of reasoning in *Newell v. Gregg* is that, as to notice of dishonor, there is no difference between an overdue and unpaid installment of principal and an overdue and unpaid installment of interest; that payment of

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\* In *Citizens' Sav. Bank v. Couse*, 124 N. Y. Supp. (Sup. Ct., Trial T., Wayne Co., June 23, 1910) 79, it was held that where a note provided that interest was payable annually, a default of interest appearing thereon when it was transferred to plaintiff was sufficient to put plaintiff on inquiry as to any defects and to require submission of plaintiff's *bona fides* to the jury. After discussing *Newell v. Gregg*, 51 Barb. 263, the court said: "I am unable to distinguish that case from this. . . . The authority of the case of *Newell v. Gregg* has not been overthrown by subsequent decisions in this state, so far as I am aware, and I feel bound to follow it, notwithstanding the fact that a different rule prevails in other jurisdictions." Referring to a dictum to the contrary in *Town of Ontario v. Hill*, 33 Hun, 250, affirmed 99 N. Y. 324, the court said: "*Newell v. Gregg* was not cited by the court or in the briefs of counsel, and apparently was not brought to the attention of the court. Certainly there was no intention shown to overrule that case." — C.

one is as much a part of the agreement as payment of the other; and that, in either case alike, the indorsee takes the note with warning that there has been a default, and that the maker may have a defense; and hence, if the one renders the paper dishonored, there is no reason for holding that the other does not. The reasoning in *Bank v. Kirby* is that, in their effect upon the credit of a note, there is a manifest difference between a failure to pay interest and a failure to pay principal; that interest is an incident of the debt, and differs from it in that it is not subject to protest and notice to indorsers or to days of grace; that the statute of limitations does not run against it until the principal is due, etc.

If the question were a new one in this state, we might, possibly, be inclined to adopt the Massachusetts doctrine, as founded on the better reasoning. But *Bank v. Scott Co.* has stood unchallenged in this state for twenty-seven years, and the decisions are not so numerous or so uniformly in favor of the opposite doctrine as to clearly prove that it is the established rule of the commercial world generally. If the rule ought to be changed, it is a very easy matter for the Legislature to do it. The practical difference between the two doctrines is not as great as might at first seem, for, even under the Massachusetts rule, the non-payment of interest is a fact proper to be considered, in connection with other circumstances, upon the question whether the holder is entitled to the position of one who has purchased the paper in good faith and without notice of existing defenses. And we do not think any court has ever gone so far as to hold that the defaults in payment of interest may not be so numerous and of such long standing as to be sufficient, of themselves, to justify a court or jury in finding that the holder was not a purchaser without notice. For these reasons we think that *Bank v. Scott Co.* should be followed, upon the ground, if no other, of *stare decisis*.

Order affirmed.<sup>6</sup>

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(c) *Must be taken in good faith and for value.*

§ 91

DEWITT v. PERKINS.

22 WISCONSIN, 473. — 1868.

ACTION on defendant's promissory note. The jury, by direction of the court, found for the plaintiff; and the defendant appealed from the judgment. The questions in dispute will sufficiently appear from the opinion.

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<sup>6</sup> Contra: *Union Investment Co. v. Wells*, 39 Can. Sup. Ct. 625, 11 Am. & Eng. Ann. Cas. 33, where the whole question is discussed at great length, and where there is also a long dissenting opinion. — C.



DIXON, C. J. — The plaintiff, knowing the defendant, and that he was in fair credit and able to respond, purchased, shortly before its maturity, a promissory note against him for three hundred dollars and interest for six months, paying therefor only the sum of five dollars. As between the defendant and the payee, the note was invalid for want of consideration. Is the plaintiff a *bona fide* holder for value, so as to protect him against the defense of a want of consideration? We answer, no. The consideration paid by him was merely nominal. It is as if the note had been given to him, and he should claim the protection afforded a *bona fide* holder for value. It appears on the face of the transaction that it was not a negotiation of the note in the usual course of business, but that the sum exacted on the one side and paid on the other was to give that the semblance of a sale, which otherwise was intended as a mere gift, or, what is worse, a shift to get the note out of the hands of the payee so as to cut off the defense of the maker, for the payee's benefit. Either view is equally fatal to the action of the plaintiff, provided the defense of a want of consideration is established.

Again, the buying of a note against a solvent maker, the purchaser knowing him to be such, for a mere nominal consideration, is very strong, if not conclusive, evidence of *mala fides*. It is constructive notice of the invalidity of the note in the hands of the seller — such as to put the purchaser upon inquiry, which if he fails to make, he acts at his peril. (*Brown v. Taber*, 5 Wend. 566; *Mathews v. Poythress*, 4 Ga. 287, 299 *et seq.*, and cases cited; *Anderson v. Nicholas*, 28 N. Y. 600; *Whitbread v. Jordan*, 1 Younge & Collyer [Exch.], 303, 328; *Jones v. Smith*, 1 Hare, 68; 1 Parsons on Notes and Bills, 254, 259–60.) The proof offered to show a failure of consideration should have been received, and the case submitted to the jury on this ground.

[Omitting a question of evidence.]

*By the Court.* — Judgment reversed, and a new trial awarded.<sup>7</sup>

## § 91

LORD BLACKBURN IN *JONES v. GORDON*.

L. R. 2 APPEAL CASES, 616. — 1877.

FARTHER, my Lords, I think it is right to say that I consider it to be fully and thoroughly established that if value be given for a bill

<sup>7</sup> Accord: *Smith v. Jansen*, 12 Neb. 125 (\$100 for \$30); *Hunt v. Sandford*, 6 Yerg. (Tenn.) 387 (\$333.33 for \$125); *Gould v. Stevens*, 43 Vt. 125 (\$300 for \$50). — H.

[See *Bailey v. Smith*, 14 Oh. St. 396, and exhaustive note to this case on "what amount paid constitutes purchaser for value" in 84 Am. Dec. 401–404. — C.]

of exchange, it is not enough to show that there was carelessness, negligence, or foolishness in not suspecting that the bill was wrong, when there were circumstances which might have led a man to suspect that. All these are matters which tend to show that there was dishonesty in not doing it, but they do not in themselves make a defense to an action upon a bill of exchange. I take it that in order to make such a defense, whether in the case of a party who is solvent and *sui juris*, or when it is sought to be proved against the estate of a bankrupt, it is necessary to show that the person who gave value for the bill, whether the value given be great or small, was affected with notice that there was something wrong about it when he took it. I do not think it is necessary that he should have notice of what the particular wrong was. If a man, knowing that a bill was in the hands of a person who had no right to it, should happen to think that perhaps the man had stolen it, when if he had known the real truth he would have found, not that the man had stolen it, but that he had obtained it by false pretenses, I think that would not make any difference if he knew there was something wrong about it and took it. If he takes it in that way he takes it at his peril.

But then I think that such evidence of carelessness or blindness as I have referred to may with other evidence be good evidence upon the question which, I take it, is the real one, whether he did know that there was something wrong in it. If he was (if I may use the phrase) honestly blundering and careless, and so took a bill of exchange or a bank-note when he ought not to have taken it, still he would be entitled to recover. But if the facts and circumstances are such that the jury, or whoever has to try the question, came to the conclusion that he was not honestly blundering and careless, but that he must have had a suspicion that there was something wrong, and that he refrained from asking questions, not because he was an honest blunderer or a stupid man, but because he thought in his own secret mind — I suspect there is something wrong, and if I ask questions and make further inquiry, it will no longer be my suspecting it, but my knowing it, and then I shall not be able to recover — I think that is dishonesty. I think, my Lords, that that is established, not only by good sense and reason, but by the authority of the cases themselves.<sup>8</sup> \* \* \*

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<sup>8</sup> "It may be true in this case that the plaintiff bought before maturity for value, and without notice of any defense; and yet he may not be a purchaser in good faith. He may, when he bought, have had knowledge of facts which excited in his mind such suspicions as to the paper that he feared to make an investigation lest it would disclose a defense, and therefore he carefully shut his eyes and bought in the dark. In such a case he would not be a purchaser in good faith." CORLISS, J., in *Knowlton v. Schultz*, 6 N. D. 417, 422, quoted in *Walters v. Rock*, 115 N. W. (N. D.) 511.

The following extract from a charge was held correct in *Mack v. Starr*, 78

I think, my Lords, that since the repeal of the Usury Laws we can never inquire into the question as to how much was given for a bill, and if Searby was in such a position that he could have proved against the estate it would have been no objection at all that he conveyed these bills to another for a nominal amount, that he sold bills nominally amounting to £1,727 for £200. Although I think that could not have been inquired into, yet the amount given in comparison with the apparent value is an important piece of evidence guiding us to a conclusion as to whether or not it was a *bona fide* transaction. I am sure of this, that in criminal cases the general evidence that is given to show that the receiver of goods which were stolen knew that they were stolen is that he has given a great undervalue for them. That is not by any means conclusive, because it may very well be that he has given the undervalue under circumstances which do not suffice to prove that he had a felonious intention, or a felonious knowledge, which would be required to make him guilty. In like manner, I think if it is shown that a considerable undervalue was given for bills, although that alone would probably not be sufficient, it is an element, and an important element, in considering whether the man who gave that undervalue was *bona fide* doing it because he was in honest blundering and stupidity taking the thing without knowing that he was committing or assisting in fraud, or because he had a suspicion that he would deprive himself of a good bargain if he made too much inquiry and so had it brought home to him that there was fraud.

(d) *Must be taken without notice of infirmity or defect.*

## § 95

### HAMILTON v. VOUGHT.

34 NEW JERSEY LAW, 187. — 1870.

BEASLEY, CHIEF JUSTICE. — We have presented to our consideration in this case but a single question, viz., whether the title of a holder of negotiable paper, acquired before it was due, for a valuable consideration, is affected by the fraud of a prior party, without proof of bad faith on the part of such holder.

Conn. 184, 187: "If there was a wilful or fraudulent failure to inquire into facts inviting inquiry, the jury might regard such failure as notice, if they thought the failure was due to the belief that inquiry would result in knowledge of the fraud. Notice may be of two kinds — explicit notice of the fraud or illegality, and implicit or general notice. If the plaintiff, when he bought the notes, had notice or knowledge of some illegality, or knowledge of some illegality or fraud which vitiated them, though he was not apprised of its nature, this would be such general notice as would affect his title. Mere negligence, however gross, not amounting to this wilful and fraudulent blindness, will not of itself amount to notice; but the jury may and should consider the fact of such negligence, as it may tend to prove such general notice." — C.

At the trial of this cause, the jury was instructed that if the holder of the note sued on — the plaintiff in the action — acquired his title under circumstances which should have put a person of ordinary prudence upon his guard, the note was invalid, if its inception had been fraudulent.

The verdict was in favor of the defense, and the plaintiff now insists that the judicial instruction should have been, that suspicious circumstances attending the acquisition of his title were not sufficient to defeat his claim, unless of a character to raise a conviction of actual fraud on his part.

Counsel who so ably argued this case in behalf of defendant, did not deny that the modern English authorities were hostile to their position, but they went upon the ground that the rule thus sanctioned was an innovation, and consequently would not be followed by this court. The ancient rule, it was maintained, is that declared in *Gill v. Cubitt* (3 Barn. & Cress. 466). This decision was made in the year 1824, and, beyond all question, it sustains the principle now claimed by the defense, for in the reported case referred to the jury were explicitly told that “there were two questions for their consideration: first, whether the plaintiff had given value for the bill, of which there could be no doubt; and, secondly, whether he took it under circumstances which ought to have excited the suspicions of a prudent and careful man.” The authority is directly in point, and the only question which can arise is, whether it correctly states the ancient rule of the common law upon the subject.

My first remark in this connection is, that from the opinion of the judges in the case of *Gill v. Cubitt*, it appears that the doctrine adopted was intended to be an innovation upon the antecedent practice, and that it was avowedly opposed to a decision of the greatest weight. Twenty-three years before, in the year 1801, Lord Kenyon, in *Lawson v. Weston* (4 Esp. 56), had expressly repudiated the idea that suspicious circumstances, in the absence of actual fraud, would avoid a note in the hands of a holder for value. But this doctrine did not harmonize with the views of the judges in the case of *Gill v. Cubitt*, and it was accordingly overruled. Thus, Chief Justice Abbott says, in his opinion: “I think the sooner it is known that the case of *Lawson v. Weston* is doubted, at least by this court, the better. I wish doubts had been cast on that case at an earlier time.” And he concludes: “For these reasons, notwithstanding all the unfeigned reverence I feel for everything that fell from Lord Kenyon, by whom *Lawson v. Weston* was decided, I cannot think that the view taken by that learned lord was a correct one.” Nor is this rejection of this antecedent decision attempted, in the slightest degree, to be put upon the foundation of pre-existing authority. Not a case is referred to for its justification, and although in *Lawson v. Weston*, the authority of Lord Mansfield, in *Miller v. Race*, was mooted, no remark is made on that circum-

stance. I think a perusal of the opinions in *Gill v. Cubitt* will satisfy anyone that it was a well-understood intention to deviate from the legal rule upon this subject which had previously existed; or, if any doubt should remain, such doubt will certainly be dispelled by a reference to the case of *Slater v. West* (3 Carr. & Payne, 325), decided in the year 1828, in which Chief Justice Abbott (then Lord Tenterden), in laying down the doctrine that a person is not entitled to recover who takes a bill of exchange “under circumstances which ought to excite suspicions in the mind of a reasonable man,” says: “This doctrine is of modern origin. I believe I was the first judge who decided this point at *nisi prius*. The court to which I belong confirmed my decision, and the other courts have, I believe, acted on the same principle.” And Chief Justice Bayley, in his opinion in *Gill v. Cubitt*, is equally explicit. “But, it is said” — such is his language — “that the question usually submitted for the consideration of the jury in cases of this description, up to the period of time at which my Lord Chief Justice’s direction was given, has been whether the bill was taken *bona fide*, and whether a valuable consideration was given for it. I admit that has been generally the case.”

From these citations, I think it is manifest that the judges who participated in the decision of the case of *Gill v. Cubitt* were aware that by the views expressed by them, they introduced a novelty, and departed from the older practice of the courts. That the principle adopted in that case was an innovation, seems to me unquestionable. I have shown that it is irreconcilable with *Lawson v. Weston*. So it plainly occupies the same relation to the case of *Peacock v. Rhodes* (Doug. 632), decided by Lord Mansfield in 1781. The rule which it endeavors to overthrow will be found sustained in *Miller v. Race*, (1 Burr. 452); *Price v. Neal* (3 Burr. 1355); *Grant v. Vaughn* (3 Burr. 1516); *Anonymous* (1 Lord Raymond, 738); *Morris v. Lee* (2 Lord Raymond, 1396.) There was not a case cited upon the argument, nor have my researches led me to one anterior to the decision of *Gill v. Cubitt*, which sustains the doctrine there propounded. I confidently conclude, therefore, that the case above criticised cannot stand on the ground of ancient authority. In my apprehension, the original rule as it existed in the time of Lords Kenyon and Mansfield was, that nothing short of *mala fides* would vitiate the title of the holder of negotiable paper taking it for value, before maturity. It is entirely out of the question, therefore, for this court to regard *Gill v. Cubitt* as imperative authority. It is true that that case was followed for a time to a considerable extent by the English courts. But, as I have already said, in England the original rule has been reinstated. In *Backhouse v. Harrison* (5 B. & Ad. 1098), Mr. Justice Patterson says: “I have no hesitation in saying that the doctrine first laid down in *Gill v. Cubitt*, and acted upon in other cases, has gone too far and ought to be restricted.” And in *Goodman v. Harvey* (4 Ad. & El.

870), Lord Denman thus forcibly expresses the rule at present prevailing in the courts at Westminster: "The question I offered to submit to the jury was, whether the plaintiff had been guilty of gross negligence or not. I believe we are all of opinion that gross negligence only would not be a sufficient answer where the party has given consideration for the bill. Gross negligence may be evidence of *mala fides*, but it is not the same thing. We have shaken off the last remnant of the contrary doctrine. Where the bill has passed to the plaintiff without any proof of bad faith in him, there is no objection to his title." The following cases recognize and enforce the same rule: (*Uther v. Rich*, 10 Ad. & El. 784; *Artbouin v. Anderson*, 1 Ad. & El. (N. S.) 498; *Stephens v. Foster*, 1 Crompt., Mees. & Ros. 894; *Palmer v. Richards*, 1 Eng. L. & Eq. 529; *Marston v. Allen*, 8 Mees. & Wels. 494; *Raphael v. Bank of England*, 17 C. B. 161.)

An examination of the American reports will disclose a similar mutation of judicial opinion upon this subject. For a time, in several of the states, the rule broached in the case of *Gill v. Cubitt* has been acted upon; but now, in most of them, and in those of the most commercial importance, that rule has been entirely discarded.<sup>9</sup> (34 New York, 247, *Magee v. Badger*; 7 Bosworth, 543, *Bel. Bank of Ohio v. Hodge et al.*; 10 Cush. 488, *Worcester, etc., Bank v. Dorchester, etc., Bank*; 4 Geo. 287, *Mathews v. Poythress*; 6 Md. 509, *Ellicott v. Martin*; 36 New Hamp. 273, *Crosby v. Grant*.)

The subject has also recently been settled, after an elaborate discussion and full consideration in the Supreme Court of the United States, in the case of *Goodman v. Simonds* (20 How. 343), the result being an explicit repudiation of the doctrine that suspicious circumstances will, *per se*, vitiate the title to commercial paper.

From this brief review of the cases, I think it may be safely said that the doctrine introduced by Lord Tenderden stands at the present moment marked with the disapproval of the highest judicial authority. Nor does such disapproval rest upon merely speculative grounds. That doctrine was put in practice for a course of years, and it was thus, from experience, found to be inconsistent with true commercial policy. Its defect — a great defect, as I think — was, that it provided nothing like a criterion on which a verdict was to be based. The rule was, that to defeat the note, circumstances must be shown of so suspicious

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<sup>9</sup> The earlier Massachusetts cases which were in accord with the rule of *Gill v. Cubitt* were overruled by later cases. See *Fillebrown v. Haywood*, 190 Mass. 472, 479. In Tennessee this rule was in force until changed by the enactment of the Negotiable Instruments Law. See *Unaka Nat. Bank v. Butler*, 113 Tenn. 574.

The rule of *Gill v. Cubitt* is still followed, however, in Vermont where the Negotiable Instruments Law has not yet been enacted. See *Limerick Nat. Bank v. Adams*, 70 Vt. 132; followed in *Capital Sav. Bank v. Montpelier Sav. Bank*, 77 Vt. 189, and *Pierson v. Huntington*, 82 Vt. 482. — C.

a character that they would put a man of ordinary prudence on inquiry — and by force of such a rule it is obvious every case possessed of unusual incidents would, of necessity, pass under the uncontrolled discretion of a jury. An incident of the transaction from which any suspicion could arise was sufficient to take the case out of the control of the court. There was no judicial standard by which suspicious circumstances could be measured before committing them to the jury. And it is precisely this want which the modern rule supplies. When *mala fides* is the point of inquiry, suspicious circumstances must be of a substantial character, and if such circumstances do not appear, the court can arrest the inquiry. Under the former practice, circumstances of slight suspicion would take the case to the jury; under the present rule, the circumstances must be strong, so that bad faith can be reasonably inferred. Thus the subject has passed from the indefinite to comparatively definite; from the intangible to the comparatively tangible. From a mere matter of fact, the question, to some extent, has become one of law.

I cannot doubt, when we recollect that inquiries of this nature always attend that class of cases where judgments are sought against innocent and unfortunate parties, that the change is most beneficial. All experience has shown how hard it is to prevent juries from seizing on the slightest circumstance, to avoid giving a verdict against the maker of a note which had been obtained by fraud or theft. To preserve the negotiability of commercial paper and guard the interests of trade, it is absolutely necessary that large power should be placed in the judicial hand when the question arises as to what facts are sufficient to defeat the claim of the holder of a note or bill which has been taken before maturity, and for which value has been paid. It is only in this mode that the requisite stability in transactions of this kind can be retained.

But I do not think the difference between the two rules above discussed is as great as some persons have supposed. In my apprehension, the entire variance consists in the degree of proof which the court will require in order to submit the inquiry to the jury. Mere carelessness in taking the paper will not, of itself, impair the title so acquired; but carelessness may be so gross that bad faith may be inferred from it. Nor is it necessary, in order to defeat the title of the holder, that he have actual knowledge of the facts and circumstances constituting the particular fraud; it is sufficient if he have knowledge that the paper is tainted with any fraud, although he may be ignorant of the nature of it. In the case of *May v. Chapman* (16 Mees & W. 355), Baron Parke says: "I agree that 'notice and knowledge' means not merely express notice, but knowledge, or the means of knowledge, to which the party wilfully shuts his eyes." Reviewed in this sense, as I have already remarked, the principle seems to me a highly salutary one, and, in the language of Professor

Parsons, is well "adapted to the free circulation of negotiable paper and the true interests of trade." (1 Par. B. & N. 259.)

I think a new trial should be granted.

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§ 95 NATIONAL BANK OF COMMONWEALTH *v.* LAW.

127 MASSACHUSETTS, 72. — 1879.

CONTRACT, against maker and indorsers of the following instrument:

\$3000.

NEW YORK, *January* 20, 1877.

Four months after date I promise to pay to the order of Charles F. Parker & Co. three thousand dollars at the National Bank of Commerce, Boston, Mass. Value received.

ALEXANDER LAW.

[Indorsed]: JOHN SAVERY'S SONS.

CHARLES F. PARKER & Co.

Law was a member of the firm of Charles F. Parker & Co., and also of the firm of John Savery's Sons. Law indorsed the firm name of "John Savery's Sons" and one D. (a partner), indorsed the firm name of Charles F. Parker & Co., and deposited the note as collateral for a loan at plaintiff bank. The note was in fact made without authority of the firm of John Savery's Sons and in fraud of the firm. The trial judge ruled that, from the form of the note itself plaintiff was, as a matter of law, affected with notice of the defense existing to the note on the part of the defendants (John Savery's Sons), other than Law, and directed a verdict for such defendants. If this ruling was incorrect, a new trial was to be ordered; otherwise, judgment on the verdict.

GRAY, C. J. [After deciding that the liability of John Savery's Sons was secondary to that of Law.] ' One partner has no authority, without the assent of his copartners, to sign the name of the partnership to a note for the individual debt of himself or of a stranger; and all persons who take such a note with knowledge, either from its appearance or otherwise, that it was made for the separate accommodation of one partner or of another person, cannot recover against the other partners without proving their authority or assent. In the present case, the defendants' name being upon the back of the note above that of the payees, it was apparent upon the note itself, read in the light of the statute, which everyone was bound to know, that the liability of the partnership was but conditional and secondary, and therefore that, *prima facie* at least, their signature was affixed for the accommodation and benefit of Law; and the ruling at the trial was

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<sup>1</sup> Mass. St. of 1874, c. 404. See Neg. Inst. L., § 114. — H.



correct. (*Angle v. Northwestern Ins. Co.*, 92 U. S. 330; *West St. Louis Savings Bank v. Shawnee Bank*, 95 U. S. 557; *Chazournes v. Edwards*, 3 Pick. 5; *Sweetser v. French*, 2 Cush. 309; *Rollins v. Stevens*, 31 Maine, 451; *Fielden v. Lahens*, 2 Abbott, N. Y. App. 111; *Lemoine v. Bank of North America*, 3 Dillon, 44.)

Judgment on the verdict.<sup>2</sup>

## § 95 CHEEVER v. PITTSBURGH, ETC., R. CO.

150 NEW YORK, 59. — 1896.

ACTION by holder against maker. Judgment for defendants. Plaintiff appeals.

O'BRIEN, J. — The complaint in this action contained four separate causes of action, each upon a promissory note of the defendant. The last two causes of action were not defended, and upon these the plaintiff recovered, but was defeated upon the two notes embraced in the first and second causes of action. The defense to these two notes was that they were made by the defendant's president, one M. S. Frost, and by him wrongfully diverted from the uses and purposes for which they were intended to his own personal or private benefit, or the benefit of a firm of which he was a member, and that the plaintiff is not a *bona fide* holder, but chargeable with notice of these facts.

The following are copies of the two notes in controversy, with the indorsements thereon when put in circulation by the defendant's president:

<sup>2</sup> Similar notes were made by Law and indorsed *first*, in the name of Charles F. Parker & Co., and *second*, in the name of John Savery's Sons, and discounted for D. by plaintiff. The trial judge made the same ruling as above. *Held*: error. "Upon the face of the note in this case, there is nothing which indicates any irregularity or invalidity in the origin or negotiability of it." The note indicates that Charles F. Parker & Co. had transferred it to John Savery's Sons, and the latter by blank indorsement to a new holder. There is no conclusive evidence that plaintiff knew it was discounting the note for C. F. Parker & Co. The inference is quite as natural that D. was the owner. *Freeman's National Bank v. Savery*, 127 Mass. 75, 78.

Where one of four partners signed in his individual name a note payable to his firm, and another partner indorsed the firm name, and the first partner then took the note to the plaintiff, filled in certain blanks in plaintiff's presence, and transferred the note to plaintiff to take up another similarly executed, but plaintiff testified that he had no knowledge that the loan was not for the benefit of the firm, *held*, that there is no conclusive proof, as matter of law, from the form of the note or other circumstance, that plaintiff had notice that the indorsement was for the maker's accommodation. It was a question of fact for the jury. *Wait v. Thayer*, 118 Mass. 473.

D. loaned money to the firm of Stewart, Hammond & Mead, taking a note signed by Hammond and indorsed by the firm. This firm was dissolved, and the firm of Hammond & Scripture was formed. Hammond arranged with D. to retain the money for the benefit of the firm of Hammond & Scripture, and

\$5,000.

GREENVILLE, PA., *Feb'y 24th*, 1888.

Four months after date the Pittsburgh, Shenango and Lake Erie Railroad Company promises to pay to the order of John T. Bruen five thousand dollars, at the American Exchange National Bank, New York City. Value received.

Attest: E. S. TEMPLETON, *Secretary*.

THE PITTSBURGH, SHENANGO & LAKE ERIE RAILROAD COMPANY,

By M. S. FROST, *President*.

[Indorsed]:

Pay to the order of M. S. Frost & Son.

JOHN T. BRUEN.

M. S. FROST & SON.

\$5,000.00.

GREENVILLE, PA., *Feb'y 24th*, 1888.

Three months after date the Pittsburgh, Shenango and Lake Erie Railroad Company promises to pay to the order of John T. Bruen five thousand dollars, at the American Exchange National Bank, New York City. Value received.

Attest: E. S. TEMPLETON, *Secretary*.

THE PITTSBURGH, SHENANGO & LAKE ERIE RAILROAD COMPANY,

By M. S. FROST, *President*.

[Indorsed]: JOHN T. BRUEN,

M. S. FROST & SON.

The body of these notes, and every part of them except the signature of the president, was in the handwriting of Templeton, the secretary. The president was authorized by the board of directors to issue the corporate notes to the extent of \$10,000 for the purpose of purchasing flat cars. In March, 1888, before the notes became due, Frost went to Boston and there negotiated a cash loan of \$30,000 from Francis A. Brooks for the benefit of M. S. Frost & Son, giving the firm note therefor and delivering to him the two notes in question, indorsed as they now appear, with other obligations, as collateral security for the payment of this loan. Subsequent to the maturity of the notes Brooks became the absolute owner by consent of the pledgor and the proceeds applied upon the debt, and still later he transferred them to a third party, and they have come to the hands

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gave D. a new note signed by Hammond and indorsed in the firm name. Scripture had no knowledge of this. *Held*: Scripture not liable. "We do not think a partner can shift his private indebtedness from his own shoulders to those of his firm by offering to his creditor to pay his debt, and then asking him to lend the amount to the firm of which he is a member, and thereupon, on the creditor's assenting, giving him without anything more a firm note for the amount, unless it is shown that the transaction is in some way brought to the knowledge of and assented to by the other member or members of the firm. It certainly would open a wide door to fraud to admit such a doctrine." *Daniels v. Hammond*, 154 Mass. 165.

The results of the cases on constructive notice from the form of the paper in the case of partnership signatures upon bills or notes negotiated by or for a partner for his own benefit, are fully stated in Ames' Cases on Partnership, pp. 526, 527-529, 533-534. See the same work (pp. 496-521) for a discussion of the subject of the authority of a partner to execute or transfer negotiable instruments in behalf of his firm, and the manner in which such instruments must be executed in order to bind the partnership. — H.

of the plaintiff for value. It is not claimed that the plaintiff occupies any other or different position than Brooks would if he had brought the action upon the notes at maturity. Bruen, the payee of the notes, was the private secretary of Frost, the president, and the notes were made payable to him by Templeton, the secretary of defendant, who drew them in that form at the suggestion of the president. There is not and cannot be any dispute with respect to the authority of Frost to make the notes. They were made with sufficient authority, the fraud upon the defendant consisting in the wrongful use of them, when made for a legitimate purpose, by the president for his own private business.

Nor is there any dispute with respect to the fact appearing on the plaintiff's case, that Brooks paid value for the notes and made present advances in cash to Frost in the sum already stated. It is equally clear upon the record that Brooks had no actual knowledge of the facts surrounding the origin of the paper or of the diversion of it by the president. He received the notes and made the advances in Boston, whereas they were made and the transactions stated with respect to them took place in a distant state, where the office of the company was, and is indicated on the paper as the place where made.

The learned trial judge held as matter of law that the plaintiff could not recover upon the notes for the reason that he was chargeable with knowledge of the facts and circumstances that rendered them invalid in the hands of Frost. The plaintiff is, doubtless, chargeable with such knowledge or notice as to the antecedent equities of the defendant as Brooks, his assignor, had, but with no others. If the notes were valid obligations in the hands of Brooks the plaintiff may assert every right that he could have asserted. It needs no argument to show that if Brooks had knowledge or notice or is in law chargeable with knowledge or notice of the fraud by means of which the notes were diverted from the purpose for which they were authorized to be made, that the plaintiff cannot recover. But it is not claimed that he knew anything about the origin or diversion of the paper in fact. All that is claimed is that when it was presented to him in Boston by Frost, whom he knew to be the president of the railroad, there was enough upon the face of the paper to put him upon inquiry and, therefore, to charge him with knowledge of all the facts that such inquiry would have disclosed. He knew nothing, so far as appears, outside of the paper itself, except the fact that the party presenting it was defendant's president, and that he was proposing to pledge the notes for his own debt, or rather for the debt of his firm, which for all the purposes of the question may be assumed to be the same thing. The question in the case is, therefore, reduced to a very narrow inquiry, and that is, whether Brooks, standing in all other respects in the position and sustaining the character of a *bona fide* purchaser of negotiable paper, is deprived of that character and the

benefits of that position by reason of anything appearing upon the face of the notes themselves.

The mind, at the threshold of the inquiry, encounters two principles that point in opposite directions and lead to different conclusions, as the one or the other is allowed to preponderate in the mental process of determining the legal rights of the parties. On the one hand is the principle which protects a *bona fide* holder of commercial paper from existing antecedent equities between the parties, and on the other the principle which protects a corporation from the unauthorized and fraudulent acts of its own officers. There is not much difficulty in stating the rule of law defining the duties and obligations of a party to whom negotiable paper is presented for discount or sale before due. He is not bound at his peril to be on the alert for circumstances which might possibly excite the suspicion of wary vigilance; he does not owe to the party who puts the paper afloat the duty of active inquiry in order to avert the imputation of bad faith. The rights of the holder are to be determined by the simple test of honesty and good faith, and not by a speculative issue as to his diligence or negligence. The holder's rights cannot be defeated without proof of actual notice of the defect in title or bad faith on his part evidenced by circumstances. Though he may have been negligent in taking the paper, and omitted precautions which a prudent man would have taken, nevertheless, unless he acted *mala fide*, his title, according to settled doctrine, will prevail. (*Magee v. Badger*, 34 N. Y. 249; *Am. Ex. Nat. Bank v. N. Y. Belting, etc., Co.*, 148 N. Y. 705; *Knorr v. Eden Musee Am. Co.*, 148 N. Y. 154; *Canajoharie Nat. Bank v. Diefendorf*, 123 N. Y. 202; *Vosburgh v. Diefendorf*, 119 N. Y. 357; *Jarvis v. Manhattan Beach Co.*, 148 N. Y. 652.)

Applying these rules to the conceded facts of the case, it seems to me to be impossible to impute bad faith to Brooks in the transaction. He advanced a large sum of money on the faith of the paper, without any actual knowledge that the relations of the party with whom he dealt to the paper were different from what they appeared to be on the face of it. The question now is, not what the facts were, but what they appeared to be, and what he had the right, from the notes themselves, to assume. He had the right to assume that the relations to the paper of every party whose name appeared on it were precisely what they appeared to be. (*Hoge v. Lansing*, 35 N. Y. 136.) He had the right to believe that the notes had been issued by the defendant to Bruen for value in the regular course of business, and were by him transferred to Frost & Son in like manner. There was nothing to suggest to him that Frost was dealing with paper that belonged to the railroad for his own benefit. The appearances were that the defendant had put the notes in circulation by delivery to Bruen, and that they came to Frost's firm in the regular course of business for value and were then the property of the firm. It is quite true that all

these appearances were deceptive and that the actual facts were otherwise. But how was a banker or business man in Boston to know or suspect that Bruen was only the nominal payee and a mere instrument in the transaction to enable the president to divert the paper to his own use. The name of the party who presented it and had it in his possession appeared on the face of the paper to have signed it as president. The name of another officer of the corporation was upon it also, attesting its regularity, and everything was in his handwriting except the signature of the president and the indorsement of the payee. So far as Brooks was concerned, the paper showed that it had been issued to a stranger in the regular course of business, and, through his indorsement, had come to the hands of a mercantile firm of which the president of the corporation was a member. If this were the fact, there is no doubt as to his right to use it in the business of the firm. The holder of a note who has no actual knowledge or notice of a defect in the title, or other equities between the parties, when circumstances come to his knowledge sufficient to put him upon inquiry, is chargeable with knowledge of all the facts that such inquiry would have revealed. The difficulty in this case is to find the circumstance which can be said to be sufficient to put Brooks upon the inquiry. There was absolutely nothing on the face of the paper except the signature, as president, of the party who was dealing with it, and that, we think, was not sufficient in view of the fact that the appearances were that he was a purchaser from a third party.

The principle that applies in a case where an officer of a corporation makes the corporate obligation payable to himself, and then attempts to deal with it for his own benefit, does not aid in solving the question in this case. When paper of that character is presented by the officer or agent of the corporation, it bears upon its face sufficient notice of the incapacity of the officer or agent to issue it.<sup>3</sup> (*Hanover Bank v. Am. Dock & T. Co.*, 148 N. Y. 612; *Bank of N. Y. v. Am. Dock & T. Co.*, 143 N. Y. 559; *Wilson v. M. E. R. Co.*, 120 N. Y. 145; *Gerona v. McCormick*, 130 N. Y. 261.) There are numerous cases that belong to that class cited by the learned counsel for the defendant on his brief. There is a manifest distinction between them and the case at bar. Here the officer was not dealing

<sup>3</sup> "Undoubtedly the general rule is that one who receives from an officer of a corporation the notes or securities of such corporation, in payment of, or as security for, a personal debt of such officer, does so at his own peril. *Prima facie* the act is unlawful, and, unless actually authorized, the purchaser will be deemed to have taken them with notice of the rights of the corporation. (*Garrard v. P. & C. R. R. Co.*, 29 Penn. St. 154; *Pendleton v. Fay*, 2 Paige, 202; *Shaw v. Spencer*, 100 Mass. 388)." — *Wilson v. Metropolitan El. Ry.*, 120 N. Y. 145, 150. Contra: *Doe v. Northwestern Coal, etc., Co.*, 78 Fed. Rep. 62, 68. — H.

[But see *Borough of Montvale v. People's Bank*, 74 N. J. L. 464, reported herein at p. 352. — C]

with the corporate notes payable to himself, but with notes that had been regularly issued, so far as appeared from their face, to a stranger and by him transferred to a firm of which the officer was a member, and for which he acted as agent in procuring the loan from Brooks and pledging them as security. The presence of Frost's name upon the paper, as one of the agents who issued it, was not naturally or reasonably calculated, under the circumstances, to arouse suspicion in the mind of Brooks, or to lead him to believe that the president was attempting to defraud the corporation in disposing of the notes. None of the cases cited by the learned counsel for the defendant sustain the proposition that such a circumstance is sufficient to put the purchaser of negotiable paper upon inquiry or charge him with knowledge of the fact in case he fails to make it, and there are many cases that tend to support the contrary view. (*Am. Ex. Nat. Bank v. N. Y. B. & P. Co.*, 148 N. Y. 698; *Miller v. Consolidation Bank*, 48 Penn. St. 514; *Walker v. Kee*, 14 S. C. 142.)

It is said that if the plaintiff's right to recover in this case is sanctioned by this court an easy way will be opened for the perpetration of frauds upon corporations by officers intrusted with its negotiable obligations, and that the device of making the paper payable to the order of a nominal payee, interested or aiding in the fraud, will be a favorite one to accomplish the end. We must leave all such cases to be dealt with upon the peculiar facts and circumstances as they arise. It is more reasonable and just to assume that corporations will be able to protect themselves by proper vigilance from the dishonesty of their own officers, than to impute to parties who have taken the paper for value, ignorant of its origin, constructive knowledge of the facts upon such circumstances as exist in this case.

We think that there was nothing on the face of the paper or in the facts shown to warrant the court in holding, as matter of law, as it did, that the obligations were received by Brooks and the advances made on them *mala fide*. That is the effect of the ruling at the trial, and the conclusion was not supported by the facts.

It follows that the judgment must be reversed and a new trial granted, costs to abide the event.

BARTLETT, J., delivered a dissenting opinion.

ANDREWS, Ch. J., GRAY and MARTIN, JJ., concur with O'BRIEN, J; HAIGHT and VANN, JJ., concur with BARTLETT, J.

Judgment reversed.<sup>4</sup>

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<sup>4</sup>In *Orr v. South Amboy Terra Cotta Co.*, 113 App. Div. (N. Y.) 103, it was held that the fact that the payee of a note executed by a corporation is a director of the corporation does not put a purchaser of the note upon inquiry as to whether its issuance was authorized. LAUGHLIN, J., said in part: "The rule applicable to notes made by officers of a corporation to their own order, and used to pay their individual obligations, has no application to notes made by the duly authorized officers, and payable to a director. It is not uncommon

§ 95 BOROUGH OF MONTVALE *v.* PEOPLE'S BANK.

74 NEW JERSEY LAW (CT. ERR. AND APP.) 464. — 1907.

GUMMERE, C. J. This is an action of replevin brought by the borough of Montvale to recover from the possession of the People's Bank

for directors to have business dealings with the corporation, and it is perfectly legitimate if they refrain from voting, and do not use their personal influence with their fellow directors for their own advantage at the expense of the corporation. But the officers of a corporation individually make the contracts in behalf of the corporation and issue its obligations. They may not lawfully contract with themselves, or use the credit of the corporation for their own benefit individually. There is reason, therefore, for the rule that one taking the negotiable paper of a corporation in payment of an individual obligation of an officer is chargeable with notice and is put upon inquiry as to whether the issuance of the paper was authorized (*Wilson v. Met. El. R. R. Co.*, 120 N. Y. 150; *Hanover Nat. Bank v. Am. Dock & Trust Co.*, 148 N. Y. 612; *Chcever v. Ry. Co.*, 150 N. Y. 59; *Rochester & C. T. R. Co. v. Paviour*, 164 N. Y. 281); but the reason does not exist in the case of a director, and therefore the rule is not applicable. The plaintiffs, therefore, were entitled to have the jury instructed, as matter of law, that the fact that the payee was a director of a corporation was not notice to the plaintiffs of any infirmity in the note, and did not put them upon any inquiry concerning the circumstances under which it was issued or came into the hands of the payee. Any other rule would seriously impair the negotiability of the corporate securities."

In *Havana Cent. R. Co. v. Knickerbocker Trust Co.*, 198 N. Y. 422, it was held (quoting the headnote) that "Where the treasurer of a corporation, authorized to sign checks for it as treasurer, drew checks to his own order and deposited them in a bank to his own account, the bank on which the checks were drawn paid them, and the bank in which they were deposited, and which collected them, credited the proceeds thereof to the individual account of the treasurer, who thereafter drew out such proceeds, the latter bank is not liable to the corporation. The deposit bank of the corporation upon which the checks were drawn was its agent to determine whether the checks were properly payable or not. When it decided that they were and paid them to another bank, in which they had been deposited by the treasurer for his individual account, which latter bank received the proceeds in good faith, this was an acknowledgment that its treasurer in fact possessed authority to draw such checks, and the corporation has no right to recover the proceeds from the bank in which they were deposited." WILLARD BARTLETT, J., on p. 429, said: "The distinguishing feature between this case and the cases relied upon to support the judgment which has been rendered herein is that in the cases cited the form of the transaction was notice to the party receiving the check or other instrument that it was sought to be used to pay an individual debt out of trust funds. Here the checks were not designed to discharge any obligation owing to the defendant. The defendant merely collected the amounts thereof and placed the same to the credit of the payee. . . . It seems to me that when a corporation opens an account with a banking institution it confers upon that institution the power to determine whether any check drawn upon the account conforms to the contract between the depositor and the depository. When it makes a mistake in the determination of such a question the depository may be liable to the depositor; but the depositor cannot recover back the money paid on such check to a third person who has received it in good faith relying on the representation of the deposit bank that the check was all right and has subsequently parted with the money." — C.

certain coupon bonds, dated July 1, 1903, payable to bearer on the first day of July, 1913, and made and executed by the borough, but which it avers were never issued or delivered by it. The case was tried in the court below upon an agreed state of facts, from which it appeared that the bonds in suit were two of an issue of thirty \$500 bonds, each of which was signed by the mayor of the borough, one Alfred M. Crotty, sealed with the corporate seal of the municipality and duly attested by the borough clerk; that some of the bonds were sold by the borough, and the remainder were left by it in the custody of the mayor until some further disposition of them should be made by the borough; that the bonds in suit are two of those which were left in the custody of the mayor; that while in his custody the latter hypothecated them with the defendant bank to secure the payment of a loan made by it to him; that the bank had no knowledge, until long after the making of the loan and the pledging of the bonds, that Crotty was not in lawful possession of them and authorized to sell and dispose of them; and, finally, that the loan made by the bank to Crotty still remains unpaid. Upon these facts, the court held as matter of law that there was never any delivery of the bonds in suit such as to impress upon them the quality of negotiable instruments, and that they had no legal force or existence in the hands of the defendant, and directed judgment to be entered in favor of the borough.

It will be observed that the bonds in suit were made and executed about a year after the act of the Legislature, entitled "A general act relating to negotiable instruments (being an act to establish a law uniform with the laws of other states on that subject)," approved April 4, 1902, went into effect. P. L. p. 583. \* \* \*

It is suggested that, although the bank had no knowledge of any lack of authority on the part of Crotty to dispose of the bonds, the fact that he signed them as mayor charged it with notice of the defect in his title within the meaning of the fifty-second section<sup>5</sup> of the statute. But it is provided by the fifty-sixth section<sup>6</sup> of the act that "to constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiable must have had actual knowledge of the infirmity or defect, or knowledge of such facts, that his action in taking the instrument amounted to bad faith." Knowledge on the part of the bank that the person to whom they made the loan was the mayor of the borough, if it had such knowledge, affords no ground for holding that its action in taking the bonds amounted to bad faith. Notwithstanding that Crotty executed them in his official capacity, he had as complete a right as any other citizen of the borough or any member of the public at large to become a purchaser of its securities, and the

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<sup>5</sup> N. Y., § 91. — C.

<sup>6</sup> N. Y., § 95. — C.



fact that he assumed to deal with them as his own in his transaction with the bank, instead of being notice to it that he was betraying the trust reposed in him by the municipality and was fraudulently putting upon the market securities which had not been issued by it, justified the bank in believing that he was in fact just what he represented himself to be by his conduct, namely, the owner of the securities. The bank is therefore the holder in due course of the bonds in suit, as such holder is defined by the statute.

The rights of the holder in due course, and the liability of the maker of a negotiable instrument which has been put into circulation by a person other than the maker and without the authority of the latter, are prescribed by the fifteenth section<sup>7</sup> of the act, which is as follows: [Quoting it.] Applying to the borough the conclusive presumption which this last-cited section of the statute prescribed for the protection of a holder in due course, it must be held to have made a valid delivery of these bonds, so far as the defendant bank is concerned, and the latter is therefore entitled to retain possession of them as outstanding obligations of the municipality. \* \* \*

The judgment under review will be reversed.<sup>8</sup>

## § 95 FOX v. CITIZENS' BANK AND TRUST COMPANY.

37 SOUTHWESTERN REPORTER (TENN.) 1102. — 1896.

BILL to enjoin defendants from further prosecuting suits on notes executed by complainants to J. C. Anderson, *trustee*, and indorsed by him to defendants. Decree for defendants. Complainants appeal.

It is conceded that there is a total failure of consideration, and that there would be a perfect defense against Anderson.

<sup>7</sup> N. Y., § 35. — C.

<sup>8</sup> This case is commented upon as follows in 24 Banking Law Journal, at p. 673: "Bankers are aware of many cases under the law merchant where the fact of the person negotiating an instrument signed by him in his official capacity for a personal debt or transaction — as for example, a cashier of a bank or treasurer of a corporation paying his private debt by a check signed by him in his official capacity — has been held to put the taker on inquiry and charge him with notice of the officer's want of authority, if such be the fact; depriving such taker of the rights of a holder in due course. But in this case the New Jersey court holds the pledgee bank not charged with notice by reason of the fact that the person personally negotiating the bonds was the official who had signed them. It bases its decision upon . . . the Negotiable Instruments Law [N. Y., § 95]. . . . If this construction of the act in its effect on the free transferability of paper by persons who sign such paper officially and negotiate it personally, is to be universally followed, it will mean a sweeping away of all the old cases which hold purchasers charged with notice where they take paper signed by an official, which is given in his private transaction. It is a construction which enlarges the negotiability of paper in this class of cases, and it may be the best rule or policy for commercial interests."

See also *Fillebrown v. Haywood*, 190 Mass. 472. — C.

WILSON, J. (After stating the facts and holding there was no actual notice given the bank.)—It is next insisted that the notes, being payable on their face to Anderson, trustee, carried notice of the equities of complainants. (Hilliard, Vend. § 408, 1 Story, 99, §§ 399, 400, and *Covington v. Anderson*, 16 Lea, 310, are cited.) Beyond question, a trustee converting trust assets to his own use is liable to the beneficiaries; and equally liable is any one purchasing from him knowing of his fraudulent intention, as having knowledge of facts that would put a reasonably prudent man on inquiry as to the power and dishonest ends of the trustee, and which inquiry, if properly prosecuted, would discover the truth. This is the extent to which the authorities cited go. But we are unable to perceive the direct connection and application of the principle cited to the facts of this case. It is well settled that the fact that the consideration for which a note is given is stated in it will not destroy its negotiability, unless the recital qualifies the promise to pay, or renders it uncertain either as to the time of payment or the sum to be paid. And if the note be received before maturity, and before a failure of consideration, it will be held free from the equities, although, from the recital, it was known to the indorser that the consideration was future and contingent. (*Goodloe v. Taylor*, 10 N. C. 458; *Stevens v. Blunt*, 7 Mass. 240; *Davis v. McCready*, 17 N. Y. 230; *Bank v. Cason*, 39 La. Ann. 865, 2 South. 881; *Siegel v. Bank*, 131 Ill. 569, 23 N. E. 417; Daniel Neg. Inst. §§ 790–796.) In other words, says the Louisiana Annual (2 South.) case and the cases in 131 Ill. 569, and 23 N. E. 417, “it cannot affect the negotiability of a note that its consideration is to be hereafter realized, or that, from contingency, it may never be enjoyed.”

The argument or proposition is advanced by implication, at least, that the fact that these notes are made payable to Anderson, trustee, impaired their negotiability, or put a transferee on notice of all equities existing as between the maker and the trustee. In a contest between the beneficiaries of these notes assuming that Anderson was not their real owner, and the transferee of Anderson, the fact that the notes appeared on their face to be payable to him as trustee would put the transferee on notice, and the claim of the beneficiaries would be superior (*Cardwell v. Cheatham*, 2 Head, 14; *Duncan v. Jaudon*, 15 Wall. 175; *Shaw v. Spencer*, 100 Mass. 389; *Alexander v. Alderson*, 7 Baxt. 403), because the notes gave direct information that they were trust property, and the direct purpose of the transfer was to pay his individual debt. (*Covington v. Anderson*, 16 Lea, 310.)<sup>9</sup>

<sup>9</sup> For an illustration of the proposition laid down in this paragraph, see *Ford v. Brown*, 114 Tenn. 467. In this case certificates of deposit issued by the B. Bank (one payable to “C. N. Woodworth, trustee,” and the other to “C. N. Woodworth, Trustee to Betty Ford”), had been indorsed by Woodworth, “C. N. Woodworth, Trustee for Betty Ford,” and sold for his own benefit to A., who indorsed them in blank and sold them for cash to the C. Bank who

The question as to whether a note payable to one as trustee is negotiable is a subject of dispute in the authorities or adjudged cases. In Maryland it seems to have been held that such a note is not commercial paper, and that an indorsement of it by the trustee transfers it, subject to the trust, and that, after such transfer, it is open to the equitable defenses between the original parties. (*Bank v. Lange*, 51 Md. 139.) But it is holden in other jurisdictions that a note to and indorsed by one as trustee of a named person does not carry to an innocent purchaser any notice of a restriction upon the payee's right to transfer it. (*Downer v. Read*, 17 Minn. 493 [Gil. 470]; *Bush v. Peckard*, 3 Har. [Del.] 385; citing Rand. Com. Paper, § 158, p. 242; *Davis v. Garr*, 6 N. Y. 124; s. c. 55 Am. Dec. 387, and note; *Pierce v. Robie*, 63 Am. Dec. 614; *Conner v. Clark*, 73 Am. Dec. 529.)

As a general thing, the addition of the words "trustee" and the like will be treated as *descriptio personæ*. (Authorities *supra*; 2 Am. and Eng. Enc. Law, p. 358, notes on pages 358 and 359.) We take it that the decided weight of authority, and, it seems to us, of sound reason, supports the position that the addition of the word "trustee" to the name of the payee of a note of itself does not destroy its negotiability. Under the rules of the common law, all conveyances by a trustee, whether to innocent purchaser or not, even if made in contravention of the trust, operated upon the legal title, and vested it in the grantee. The beneficiary had to go into equity,

sought to collect them from the B. Bank. Betty Ford brought an action against A., the B. Bank and the C. Bank to enjoin the B. Bank from paying the certificates. A decree in favor of the complainant was affirmed on appeal.

MCALLISTER, J., said in part: "These authorities sustain our position that the word 'trustee,' in an indorsement of this character, is express notice to a purchaser that there is a *cestui que trust* or beneficiary, and that his rights may not be sacrificed by the trustee in the sale or pledge of the note for his own benefit. In other words, our holding distinctly is that such an indorsement is actual notice to the purchaser of such paper within the meaning of section 56 [N. Y., § 95] of the Negotiable Instruments Law." P. 479. "We are therefore of opinion that the indorsements and recitals of these certificates communicated actual knowledge to the [C.] bank that they represented a trust fund and, even under the Negotiable Instruments Act, no title was acquired by the [C.] bank to the paper." P. 482.

A note to this case in 1 L. N. S. 188, says: "Some confusion has existed between the question of the effect of the use of the word 'trustee,' in describing the payee or holder of an instrument, upon its negotiability, and the other question of the effect of the use of that word to give notice to subsequent takers of the trust character of the instrument and of the rights of the beneficiaries. In some of the treatises on the subjects of trusts and of negotiable instruments there has been a failure to distinguish between these quite different questions. The question of the effect of describing a payee as a 'trustee' upon the negotiability of the instrument relates to the defenses of the makers or obligors as against those to whom the trustee has transferred the instrument, while the other question relates to the rights of the beneficiaries as against such transferees."—C.

and there he could compel the grantee to respect the trust, as the original trustee should have done. (*Gale v. Mensing*, 20 Mo. 461; s. c. 64 Am. Dec. 197, and notes; see, also, *Tyler v. Herring*, 67 Miss. 169, 6 South. 840; s. c., 19 Am. St. Rep. 263, and extended note where the subject with the authorities, is fully presented.) The substance or real rule, in the absence of a statute, in respect to unauthorized sales or transfers of property by trustees, is that they are voidable at the election of the parties in interest, and, until so avoided, the grantee has all rights in the property as to third parties. In this case there is no evidence that the notes did not belong to Anderson, or that he did not have the right to deal with them as he pleased. The result is that as to these complainants, the defendant bank is an innocent purchaser of the notes, for value, without notice of any equities in their favor; and, this being so, the decree of the chancellor is correct, and must be affirmed, with costs.<sup>1</sup>

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(e) *Notice before full amount paid.*

§ 93      **DRESSER v. MISSOURI, ETC. COMPANY.**

93 UNITED STATES, 92. — 1876.

MR. JUSTICE HUNT delivered the opinion of the Court.

This action is brought upon three several promissory notes made by the Missouri and Iowa Railway Construction Company, dated Nov. 1, 1872, payable at two, three, and four months, to the order of William Irwin, for the aggregate amount of \$10,000.

The defense is made that they were obtained by his fraudulent representations.

But a single point requires discussion. Conceding that the present plaintiff received the notes before maturity, and that his holding is *bona fide*, the question is as to the amount of his recovery.

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<sup>1</sup> The addition of the term "trustee," "agent," etc., to the name of the payee is restrictive in effect. It merely gives notice of the rights of the *cestui* or the principal; it cannot logically be held to give notice of a defense in favor of the maker. See as to restrictive indorsements, Neg. Inst. L., § 66. See also § 27, subsec. 6; *Davis v. Garr*, 6 N. Y. 124, *ante*, p. 121.

A qualified indorsement is not notice of any infirmity in the instrument. *Lomax v. Picot*, 2 Rand. (Va.) 247. The death of the maker, known to the buyer, does not deprive the buyer of the position of a holder in due course. *Clark v. Thayer*, 105 Mass. 216.

The doctrine of notice by *lis pendens* has no application to negotiable paper. *County of Warren v. Marey*, 97 U. S. 106. Nor should the maker, before maturity, be liable to garnishment at the suit of a creditor of the payee, for a purchaser from the payee in due course should be protected. 1 Daniel on Neg. Inst., § 800a. — H.

Under the ruling of the court he recovered \$500. His contestation is, that he is entitled to recover the face of the note, with interest.

After the evidence was concluded, the plaintiff asked the court to charge the jury, that if they believed, from the evidence, that the plaintiff purchased the notes in controversy of William Irwin for a valuable consideration, on the 1st of November, 1872, and paid \$500, part of the consideration, on 21st day of January, 1873, before any notice of any fraud in the contract, he was entitled to recover the whole amount of the notes; and the court refused this instruction. But the court charged the jury,—

“That, in the first place, the jury must find that there was fraud in the inception of the notes as alleged; and that if the defendants failed to satisfy the jury of that fact, the whole defense fails.

“That if the fact of fraud be established, and the jury find from the evidence that the plaintiff paid \$500 upon the notes without notice of the fraud, and that after receiving notice of the fraud the plaintiff paid the balance due upon the notes, he is protected only *pro tanto*; that is, to the amount paid before he received notice.”

It does not appear that, upon the purchase of the notes in suit, the plaintiff gave his note or other obligation which might by its transfer subject him to liability. His agreement seems to have been an oral one merely,—to pay the amount agreed upon, as should be required; and he had paid \$500, and no more, when notice of the fraud was brought home to him.

The argument of the plaintiff in error is that negotiable paper may be sold for such sum as the parties may agree upon, and that, whether such sum is large or small, the title to the entire paper passes to the purchaser. This is true; and if the plaintiff had bought the notes in suit for \$500, before maturity and without notice of any defense, and paid that sum, or given his negotiable note therefor, the authorities cited show that the whole interest in the notes would have passed to him, and he could have recovered the full amount due upon them. (*Fowler v. Strickland*, 107 Mass. 552; *Park Bank v. Watson*, 42 N. Y. 490; *Bank of Michigan v. Green*, 33 Iowa, 140.) The present case differs from the cases referred to in this respect. The notes in question were purchased upon an unexecuted contract, upon which \$500 only had been paid when notice of the fraud and a prohibition to pay was received by the purchaser. The residue of the contract on the part of the purchaser is unperformed, and honesty and fair dealing require that he should not perform it; certainly, that he should not be permitted, by performing it, to obtain from the defendants money which they ought not to pay. As to what he pays after notice, he is not a purchaser in good faith. He then pays with knowledge of the fraud, to which he becomes a consenting party. One who pays with knowledge of a fraud is in no better position than if he had not paid at all. He has no greater equity, and receives no greater pro-

tection. Such is the rule as to contracts generally. In the case of the sale of real estate for a sum payable in instalments, and circumstances occur showing the existence of fraud, or that it would be inequitable to take the title, the purchaser can recover back the sum paid before notice of the fraud, but not that paid afterwards. (*Barnard v. Campbell*, 53 N. Y. 73; *Lewis v. Bradford*, 10 Watts, 82; *Juvenal v. Jackson*, 2 Harris, 529; *Id.* 430; *Youst v. Martin*, 3 S. & R. 423, 430.)

In *Weaver v. Barden* (49 N. Y. 291), the court use this language: "To entitle a purchaser to the protection of a court of equity, as against a legal title or a prior equity, he must not only be a purchaser without notice, but he must be a purchaser for a valuable consideration; that is, for value paid. Where a man purchases an estate, pays part and gives bonds for the residue, notice of an equitable incumbrance before payment of the money, though after giving the bond, is sufficient. (*Touville v. Naish*, 3 P. Wms. 306; *Story v. Lord Windsor*, 2 Atk. 630.) Mere security to pay the purchase price is not a purchase for a valuable consideration. (*Hardingham v. Nicholls*, 3 Atk. 304; *Maundrell v. Maundrell*, 10 Ves. 246, 271; *Jackson v. Cadwell*, 1 Cowen, 622; *Jewell v. Palmer*, 7 J. C. 65.) The decisions are placed upon the ground, according to Lord Hardwicke, that if the money is not actually paid the purchaser is not hurt. He can be released from his bond in equity."

The plaintiff here occupies the same position as the *bona fide* purchaser of the first of a series of notes, of which, after notice of a fraud, he purchases the rest of the series. He is protected so far as his good faith covers the purchase, and no further.

Upon receiving notice of the fraud, his duty was to refuse further payment; and the facts before us required such refusal by him. (Authorities *supra*). *Crandell v. Vickery* (45 Barb. 156), is in point. \* \* \*

To the same purport in principle, although upon facts somewhat different, are the cases of *Garland v. The Salem Bank* (9 Mass. 408); *The Fulton Bank v. The Phoenix Bank* (1 Hall, 562); and *White v. Springfield Bank* (3 Sandf. S. C. 227).

The cases are numerous that where a *bona fide* holder takes a note misappropriated, fraudulently obtained, or without consideration, as collateral security, he holds for the amount advanced upon it, and for that amount only. *Williams v. Smith*, 2 Hill, 301; *Allaire v. Hartshorn*, 1 Zab. 663.) \* \* \*

The case before us is governed by the rule that the portion of an unperformed contract which is completed after notice of a fraud is not within the principle which protects a *bona fide* purchaser.

No respectable authority has been cited to us sustaining a contrary position, nor have we been able to find any. The judgment below is based upon authority, and upon the soundest principles of honesty and fair dealing. It has our concurrence, and is affirmed.

## 2. HOLDER DERIVING TITLE FROM HOLDER IN DUE COURSE.

## § 97

SIMON *v.* MERRITT.

33 IOWA, 537. — 1871.

ACTION by the holder of a promissory note against the maker. There was a verdict and judgment for defendant. Plaintiffs appeals.

BECK, Ch. J. \* \* \* Among other instructions the court gave the jury the following: "If you find from the evidence that the note in question was obtained of the makers by fraud and deception, and if you further find that the plaintiff, Simon, knew of such fraud and deception, or if he had reason to know or believe that said note was fraudulently obtained of the maker, and that it is void, and if, because of such knowledge or belief, he refused to receive or purchase it of Leggett until an indemnifying bond was executed to him by Leggett, then the law of the case is with the defendant, and if you so find then your verdict should be for defendant." And the instruction directed the jury that if plaintiff, "in good faith, for a valuable consideration, obtained the note in the ordinary course of business, before maturity, without notice of fraud, or without having reason to know or believe that the note was obtained by fraud of the maker," they should find for plaintiff.

These instructions are erroneous. They leave out of view the well-settled doctrine that if Leggett, the transferer of plaintiff, was such an innocent and *bona fide* holder of the paper, that in his hands it could have been enforced against defendant, plaintiff, although he may have taken the note charged with notice of its infirmities, may recover in this action.<sup>2</sup> If Leggett so held the note, his title and rights thereto were such that they could not have been defeated by defendant. In the transfer, the title and rights held by him passed to plaintiff. The notice which plaintiff may have had of the fraud in the original transaction does not defeat the rights he acquired by the transfer.

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<sup>2</sup> This doctrine applies to a purchase after maturity as well as to a purchase before maturity. *Barker v. Lichtenberger*, 41 Neb. 751. But it does not apply to a purchase from a subsequent holder in due course by a prior party who when he held the instrument was chargeable with notice of its infirmities. Thus, in *Kost v. Bender*, 25 Mich. 515, 516, COOLEY, J., said:

"It is perfectly true as a general rule, that the *bona fide* holder of negotiable paper has a right to sell the same, with all the rights and equities attaching to it in his own hands, to whoever may see fit to buy of him, whether such purchaser was aware of the original infirmity or not. Without this right he would not have the full protection which the law merchant designs to afford him, and negotiable paper would cease to be a safe and reliable medium for the exchange of commerce. For, if one can stop the negotiability of paper against which there is no defense, by giving notice that a defense once existed while it was held by another, it is obvious that an important element in its value is at once taken away. But I am not aware that this rule has ever been applied to a purchase by the original payee, nor can I

One reason of the rule is obvious. The maker of the note would be liable to the transferer; his condition is made no harder by the note coming into the hands of one having notice of its infirmities. We do not understand that there is any conflict in the authorities upon this point. (*Hoskell & Gervay v. Whitmore*, 19 Me. 102; *Smith v. Hiscock*, 14 Id. 449; *Prentice & Messenger v. Zane*, 2 Gratt. 262; *Boyd v. McCann*, 10 Md. 118; *Howell v. Crane*, 12 La. An. 126; see authorities cited in Story on Prom. Notes, § 191.)

The instructions above set out, being in conflict with this doctrine, ought not to have been given. For this reason the judgment of the District Court is reversed.

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### 3. RIGHTS OF HOLDER IN DUE COURSE TO RECOVER FULL AMOUNT.

#### § 96

#### BISSELL *v.* DICKERSON.

64 CONNECTICUT, 61. — 1894.

BALDWIN, J. (After disposing of another matter.)—The plaintiff's appeal is based on the instruction given to the jury, that in the action against the maker of a negotiable accommodation note by an indorsee, who took it in good faith for value before maturity, and without notice of any infirmity, if the defendant proves that it was obtained from him by the payee and indorser by fraud, the rule of damages is the amount paid by the plaintiff. A note given for the accommodation of the payee, which he has thus negotiated to a *bona fide* purchaser, stands, as between the holder and maker, on the same footing as if it were business paper.<sup>3</sup> The jury should therefore have been

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perceive that it is essential to the protection of the innocent indorsee, that it should be. It cannot be very important to him, that there is one person incapable of succeeding to his equities, and who consequently would not be likely to become a purchaser. If he may sell to all the rest of the community, the market value of his security is not likely to be affected by the circumstance, that a single individual cannot compete for its purchase, especially when we consider that the nature of negotiable securities is such that their market value is very little influenced by competition. Nor do I perceive that any rule or principle of law would be violated by permitting the maker to set up this defense against the payee, when he becomes indorsee, with the same effect as he might have done before it had been sold at all, or that there is any valid reason against it."

*Kost v. Bender*, *supra*, is approved in *Aragon Coffee Co. v. Rogers*, 105 Va. 51, reported in 8 A. & E. Ann. Cas. 623, with note entitled "Title acquired by payee of instrument fraudulently procured from maker, or subject to other defenses, by repurchase after transfer to innocent third person."—C.

<sup>3</sup>Business paper (as distinguished from accommodation paper), may be purchased for any price without involving any question of usury, for the transaction is a sale and purchase and not a loan. *Cram v. Hendricks*, 7 Wend. (N. Y.) 569; *Corning v. Pond*, 29 Hun (N. Y.), 129. But a transfer of accom-



instructed that the rule of damages under the circumstances stated in the charge, was the face of the note, with interest from its maturity. (*Belden v. Lamb*, 17 Conn. 441, 453; *First Ecclesiastical Society v. Loomis*, 42 Conn. 570, 574; *Rowland v. Fowler*, 47 Conn. 347; *Cromwell v. County of Sac*, 96 U. S. 51, 60.)

There is error, and a new trial is ordered upon the plaintiff's appeal, in case one should not be granted by the City Court, on the ground that the verdict was against the evidence.

## § 96 JEFFERSON BANK *v.* CHAPMAN-WHITE-LYONS CO.

123 SOUTHWESTERN (TENN.) 641. — 1909.

ACTION on note. Judgment for plaintiff and defendant appeals.

MCALISTER, J. \* \* \*

It is said, however, by counsel for appellant, that in no event is the complainant entitled to recover exceeding the amount it paid for said note, with interest. It appears that the decree below was for the full amount of the note, with interest and attorney's fees amounting to \$251.75. Counsel, in support of his position, invokes the principle announced in *Oppenheimer v. Bank*, 97 Tenn. 19, wherein it was said:

"We hold, however, that, these notes being fraudulent in their inception and without consideration between the original parties, the bank will only be entitled to recover to the extent of the sum actually paid by it, to wit, the sum of \$1,200 and interest. In other words, we hold there was a negotiation of the notes in due course of trade only to the extent of the amount actually paid."

Again, in *Campbell v. Brown*, 100 Tenn. 245, it is said:

"The purchaser of a note at a rate of discount equivalent to 40 per cent. per annum cannot, though innocent of any wrong, recover more than the amount actually paid against the maker in fraud of whose rights the note was transferred." \* \* \* But we are of opinion that this question is now settled by section 57<sup>4</sup> of the nego-

modation paper by the accommodated party to one knowing the facts, is a loan and not a purchase and sale, and if it be at a rate of discount greater than that allowed by the usury laws, is usurious. *Ibid*; 1 Daniel on Neg. Inst., §§ 750-753. Many cases hold the same as to accommodation paper even though the buyer does not know it to be accommodation paper; but this view has been criticised. *Ibid*.

There has been great conflict among the authorities as to the amount a holder in due course may recover from an accommodation party or a party whose assent to the paper has been procured by fraud. 1 Daniel on Neg. Inst., §§ 754-758. The Neg. Inst. Law, § 96, settles the law in conformity to the rule of the Supreme Court of the United States. *Cromwell v. County of Sac*, 96 U. S. 60; *R. Co. v. Schutte*, 103 U. S. 118. — H.

<sup>4</sup> N. Y., § 96. — C.

tible instruments law, which provides that the innocent holder "may enforce payment of the instrument for the full amount thereof against all parties liable thereon."

Judgment affirmed.<sup>5</sup>

## § 96 NATIONAL BANK OF MICHIGAN *v.* GREEN.

33 IOWA. 140. — 1871.

ACTION by holder against indorser. The answer set up a sale for less than the face value. Demurrer to this defense overruled. Judgment for defendant.

DAY, CH. J. — In objection to the second count<sup>6</sup> it is claimed that the holder of negotiable paper is entitled to recover of the indorser the whole amount thereof without reference to the amount paid therefor. Upon this question the decisions are not in harmony. \* \* \* Without attempting a review of the authorities bearing upon this branch of the demurrer, we deem it sufficient to state as our opinion that the indorsee in good faith of a promissory note, is entitled to recover of the indorser the amount of the note.

This view has the unqualified indorsement of Mr. Parsons. (See 2 Parsons, Notes and Bills, 428. Also, *Durant v. Banta*, 3 Dutch. 623, 635.) It follows that the demurrer to the second count should have been sustained.

Reversed.<sup>7</sup>

## § 96 MERRITT *v.* BENTON.

10 WENDELL, 116. — 1833.

ACTION against indorser. Judgment for amount of note and notary's fees. Defendant moves for new trial.

<sup>5</sup> "It is insisted by defendant's counsel that as plaintiff paid only \$1,000 for the note and mortgage, the execution of which was induced by fraud, the sum so paid and interest thereon is the limit of his recovery, and not the sum specified in the note. A diversity of judicial utterance exists on this important question, as will be seen by examining the authorities collated in the notes appended to the cases of *Bailey v. Smith*, 14 Oh. St. 396, 84 Am. Dec. 385, and *Bedell v. Herring*, 77 Cal. 572, 11 Am. St. Rep. 307. Whatever the rule may be in other jurisdictions, it is settled in this state by statute [the Negotiable Instruments Law], enacted prior to the giving of the note and mortgage, that the holder of a negotiable instrument in due course may enforce payment for the full amount thereof against all parties liable thereon; B. & C. Comp., § 4459 [N. Y., § 96]." MOORE, J., in *Lassas v. McCarty*, 47 Or. 474, at p. 484. — C.

<sup>6</sup> Only so much of the opinion is given as relates to this. — H.

<sup>7</sup> The amount of recovery against the indorser has been a matter of great contention. 1 Daniel on Neg. Inst., §§ 766-768. It is now settled by the Neg. Inst. Law, § 96, in conformity with the view of the principal case. — H.

*By the Court*, SAVAGE, C. J.—The remaining question is, whether the fees of protest were properly chargeable to the defendant.<sup>8</sup> As to this we have not been referred to any decided case, and we understand that the practice at the circuit is not uniform, though the fees of protest are generally allowed. It is an expense to which the holder of a note is subjected by reason of the default of the indorser, whose duty it is to pay the note at maturity, and it is right, therefore, that the holder should recover it. It may fairly be considered as a charge incident upon the indorser's failure to perform his contract, and should be allowed to the plaintiffs in the assessment of damages.

New trial denied.<sup>9</sup>

## § 96

## SIMPSON v. GRIFFIN.

9 JOHNSON (N. Y.) 131. — 1812.

IN ERROR, on *certiorari* from a justice's court.

Griffin sued Simpson before the justice, and declared for money had and received to his use, and for money lent. The defendant pleaded *non assumpsit*. The plaintiff proved, that he had been sued as indorser of a note drawn by the defendant, and had been obliged to pay, besides the amount of the note, nineteen dollars, costs of suit. The taxed bill was produced to the justice, who gave judgment for the plaintiff, for the amount.

PER CURIAM.—If the indorser of a note be duly fixed, he ought to pay it, without waiting to be sued, but if he finds it more convenient to delay taking up the note, until he is prosecuted to judgment and execution, the drawer ought not to pay for that convenience. It is his own fault or misfortune that subjects him to costs, and he cannot resort to the drawer for indemnity against those costs. The mere fact of drawing the note does not imply a promise to save the payee harmless from all costs and charges that he may be subjected to, as indorser. There must be a special promise to save harmless before the payee can call upon the drawer for costs accrued by the default of the payee himself. As payee, he can only look to the drawer for the amount of the note. The judgment must, therefore, be reversed.

Judgment reversed.<sup>1</sup>

<sup>8</sup> Only so much of the opinion as relates to this question is here given. — H.

<sup>9</sup> For recovery of "re-exchange" see Bills of Exchange Act, § 57, subsec. 2; 2 Daniel on Neg. Inst., §§ 1444-1447; *Bank of U. S. v. U. S.*, 2 How. (U. S.) 737. — H.

<sup>1</sup> Accord: *March v. Barnet*, 114 Calif. 375. "A surety, including a drawer or indorser, may recover, in an action against his principal, . . . his reasonable costs and other expenses, incurred necessarily and in good faith, in the prosecution or defense, by the express or implied consent of the principal . . . of an action or special proceeding, relating to the demand secured." N. Y. Code Civ. Proc., § 1916. — H.

#### 4. BURDEN OF PROOF.

§ 98

### PARSONS v. UTICA CEMENT CO.

73 ATLANTIC (CONN.) 785. — 1909.

BALDWIN, C. J. The result of a former trial of this cause, in which a verdict was rendered for the plaintiff, is reported in 80 Conn. 58. On a second trial there has been a verdict for the defendant, and error is claimed in respect to the charge to the jury.

The complaint contained two counts, each alleging (as in Practice Book, form 334) that \$2,000 is due to the plaintiff from the defendant on an instrument under seal, of which a copy is annexed and marked as an exhibit. The first defense to each count was a general denial. A second defense to each was that the bonds, which were payable to bearer and matured January 1, 1890, more than 16 years before the suit was brought, were owned, in 1887, by the Continental Life Insurance Company, and were then fraudulently taken from its possession by the plaintiff's husband, who was its president, without any consideration moving to the company, and came into her possession with notice of that fact, without any consideration moving from her, and that she was never a *bona fide* holder. These allegations were denied by the reply.

On the first trial the jury were instructed that, as the plaintiff had possession of the bonds, the burden of proof was on the defendant to show that she was not a *bona fide* holder, and that to do this it must satisfy them, by a fair preponderance of evidence, that she acquired the bonds, either without paying any value, or knowing that her husband had taken them from the insurance company improperly and fraudulently. It having been an undisputed fact, during that trial, that her husband's title was defective, we held this charge erroneous, since the burden was upon her to show value paid or want of notice of the defect, not on the defendant to show no value paid or the existence of notice. In support of this conclusion we referred to the Negotiable Instruments Act (Gen. St. 1902, §§ 4171, 4222, 4229).<sup>2</sup> Our attention is now called to the provision in Gen. St. 1902, § 4170,<sup>3</sup> that the succeeding sections of the chapter, which include those above mentioned, shall not apply to negotiable instruments made and delivered prior to 1897.

The Negotiable Instruments Act, in most respects, was simply a codification of the common law in reference to the subject in hand. It was such in respect to the provision of section 4229<sup>4</sup> that "every

<sup>2</sup> N. Y., §§ 20, 91, 98. — C.

<sup>3</sup> N. Y., § 6. — C.

<sup>4</sup> N. Y., § 98. — C.

holder is deemed *prima facie* to be a holder in due course; but, when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he, or some person under whom he claims, acquired the title as a holder in due course." In Byles on Bills (chapter 4, p. \*60) the common law on this subject, with reference to the burden of proving a consideration, is thus stated: "The defendant is not in general permitted to put the plaintiff on proof of the consideration which the plaintiff gave for the bill, unless the defendant can make out a *prima facie* case against him by showing that the bill was obtained from the defendant, or from some intermediate party, by undue means, as by fraud, felony, or force, or that it was lost, or that he received no consideration."

Where, as here, it appears that the negotiable paper in suit, though there was nothing wrong in its original issue, was obtained from an intermediate party by fraud, proof of consideration is only called for from the plaintiff because it would tend to show that he nevertheless is a "*bona fide*" holder within the meaning of that term in the law merchant. Whether he acquired the paper by purchase or gift would, under ordinary circumstances, be of itself unimportant. But after proof that it was once in the hands of a fraudulent holder, it may justly be presumed to continue in the hands of a holder of that character until the contrary be proved. *Collins v. Gilbert*, 94 U. S. 753, 761, 24 L. Ed. 170.

The position of the holder of negotiable paper is of an exceptional character. He may acquire a title through a thief, and yet maintain it against the original owner. But his possession is not enough to support a recovery, after it once appears that he must trace title through fraudulent practices and unclean hands. *Totten v. Bucy*, 57 Md. 452. This is equally true whether the fraudulent practices were connected with the original inception of the paper, or, as in the present instance, occurred subsequently, to the prejudice of an intermediate holder. *Fulton Bank v. Phoenix Bank*, 1 Hall (N. Y.) 562; 2 Parsons on Notes and Bills, \*283; 4 Am. & Eng. Encycl. of Law, 322. The case of *Kinney v. Kruse*, 28 Wis. 183, asserts the contrary, but is opposed to the strong current of authority.

The cause went to the jury, as respects each count, on two issues. One was on the truth of the complaint; the other was on the truth of the special defense. As to the former issue, the plaintiff had the burden of proof from the outset and to the end. *Lockwood v. Lockwood*, 80 Conn. 513, 521. As to the latter issue, her production of the bond, its due execution being admitted, raised a presumption of title, which made out a *prima facie* case. But as soon as it appeared, either by her witnesses or those of the defendant, that this bond was fraudulently abstracted from the assets of a third party to which it originally belonged, this presumption no longer availed her, and her original burden of proof, only temporarily satisfied by its aid, rested

upon her again, and now required her to show a title by affirmative evidence that she obtained the instrument both in good faith and for a valuable consideration. Her good faith she could only show by proof that, when the bond came to her, she had no knowledge of such fraud, and was not equitably chargeable with notice of it. *Baxter v. Camp*, 71 Conn. 245, 253; *Fulton Bank v. Phœnix Bank*, 1 Hall (N. Y.) 577.

The defendant, it is true, had the burden for certain purposes of proving that she took the bond with such notice, and without consideration; but these purposes were accomplished when the fact was established of its fraudulent abstraction from the assets of the insurance company by her grantor. One legal presumption established by the law merchant was thus met with another legal presumption established by the same law, which by that law was sufficient to destroy it. In a concurring opinion, often quoted, given in a case of similar character, in which a ruling of his at *nisi prius* was pronounced erroneous, Baron Martin observed that he did not profess to understand how, when several facts were alleged in a plea, all necessary to make it good, and all put in issue, proof of one could relieve a defendant from the burden of proving the rest; but that, whatever might be the philosophy of that matter, the rule was so, and it was a useful one because it threw a difficulty in the way of fraudulent indorsements. *Harvey v. Towers*, 15 Jur. 544; 4 Eng. Law & Equity, 531.

The charge to the jury in the Superior Court, which followed the rule as stated by us when the cause was previously here (*Parsons v. Utica Cement Co.*, 80 Conn. 60), was in conformity to the principles of common-law procedure prior to the adoption of the Negotiable Instruments Act. The instructions thus given were that, while the plaintiff, as holder of the bonds, was *prima facie* their owner in good faith, if the defendant had satisfied them by a fair preponderance of evidence that they were fraudulently obtained from the true owner, the insurance company, then the burden rested on the plaintiff of proving that she acquired them in good faith and for a valuable consideration, without knowledge of the fraud, or without being chargeable with knowledge of it.

The law merchant, which governed the disposition of the cause, gave to *bona fide* holders, in due course, of negotiable bonds payable to bearer the valuable privilege of suing on them in their own name, with all the rights for the purposes of the action of an absolute owner. But it deemed no one a *bona fide* holder in due course who obtained possession without giving any valuable consideration in return. *Brush v. Scribner*, 11 Conn. 388, 29 Am. Dec. 303. It recognized the *bona fide* holder in due course, not as owner, but as having the rights of an owner for the purposes of suit, to be protected no farther than the necessity of maintaining the free negotiation of commercial paper requires. *Olmstead v. Winsted Bank*, 32 Conn. 278, 287. There was

no necessity of that description to call for the allowance of actions by holders of stolen securities who paid nothing for them, even if they accepted them before their maturity, and with no notice of any infirmity in their grantor's title. They might be *bona fide* holders, but they were not "holders in due course;" for that term refers to due course of trade, and trade rests on an exchange of values. *Roberts v. Hall*, 37 Conn. 205, 212. \* \* \* There is no error. The other judges concur.<sup>5</sup>

## § 98

## CLARK v. PEASE.

[Reported herein at p. 370.]

## § 98

## VIOLET v. ROSE.

39 NEBRASKA, 660. — 1894.

IRVINE, C. \* \* \*

It is a universal principle that, in the absence of any attack upon the validity of a negotiable instrument, as between its original parties, the holder bringing the action upon it is presumed to be a *bona fide* holder for value. When, however, the holder or acceptor, in an action against him upon the instrument, sets up matter in defense which would constitute a valid defense were the action brought by the original payee, it is frequently a question of difficulty as to where the burden of proof lies upon the issue of *bona fides*. The writer is unable to perceive why, upon different defenses, there should be any distinction as to the burden of proof upon that issue, whatever the defense pleaded. It may be urged, upon one side, that the policy of the law merchant in favoring the free negotiation of bills and notes demands that the maker, in order to defend against an indorsee, should prove affirmatively that such indorsee is not a *bona fide* holder for value; and to this argument there may be added that the plaintiff in such a case has already in his favor a presumption of *bona fides*, and that no evidence of a defense growing out of transactions between the original parties has a natural tendency to rebut such presumption; but, upon the other hand, whatever may be the fundamental defense, it would seem that the proof of a *bona fide* purchase for value before maturity lies peculiarly within the possession of the plaintiff; that such facts are always easily susceptible of proof by him, whereas proof of *mala fides* or want of consideration, even where the facts exist, is

<sup>5</sup> For other cases decided under the Negotiable Instruments Law, see *McNight v. Parsons*, 136 Iowa, 390, and *Keene v. Behan*, 40 Wash. 505.

The English Bills of Exchange Act is construed to the same effect in *Tatum v. Haslar*, L. R. 23 Q. B. D. 345. — C.

frequently beyond the knowledge or reach of the defendant. These arguments upon either side apply with equal force, whatever may be the fundamental defense; but unfortunately the courts have drawn distinctions between defenses. The numerous decisions disclose a general tendency to cast the burden of *bona fides* upon the plaintiff, where illegality of consideration or fraud is alleged, and in other cases to cast the burden of showing notice or want of consideration upon the defendant. But even the test suggested by this general tendency of authorities is not trustworthy, for the classification thus resorted to has not been strictly recognized, and possibly it has not been absolutely observed, by the courts of any state. While this confusion of authorities is to be regretted, the distinctions referred to, whether well or ill founded, have been recognized everywhere, and our own decisions probably approach the general classification referred to as nearly as those of any state. Thus, it has been held that, where usury is established, the burden is upon the plaintiff to show *bona fides*. *Wortendyke v. Meehan*, 9 Neb. 221; *Olmsted v. Security Co.*, 11 Neb. 487; *Darst v. Backus*, 18 Neb. 231; *Sedgwick v. Dixon*, 18 Neb. 545; *Cheney v. Janssen*, 20 Neb. 128; *Knox v. Williams*, 24 Neb. 630; *Bank v. Davis*, 25 Neb. 376; *Blackwell v. Wright*, 27 Neb. 269; *Richardson v. Stone*, 28 Neb. 137; *Bank v. Miltonberger*, 33 Neb. 847; *Colby v. Parker*, 34 Neb. 510. So, also, where the evidence established the theft of a note payable to bearer. *Hooper v. Browning*, 19 Neb. 420. So, too, where fraud in the inception of the note is proved. *Haggland v. Stuart*, 29 Neb. 69. On the other hand, where the defense was in the nature of failure of consideration, and the plaintiff, as a part of his case in chief, had introduced evidence tending to show a *bona fide* purchase, it was held that no testimony in support of the fundamental defense was proper unless the defendant introduced evidence tending to show that the plaintiff was not a *bona fide* purchaser. *Organ Co. v. Boyle*, 10 Neb. 409. In *Cannon v. Canfield*, 11 Neb. 506, the inference is that, where want of consideration is shown, the burden is also upon the maker to prove notice to the indorsee. The same inference is to be drawn, in case of failure of consideration, from *Bank v. Ryman*, 12 Neb. 541. But a contrary inference might be drawn from a closing paragraph of the opinion in *Bank v. Edholm*, 25 Neb. 741. In *Coakley v. Christie*, 20 Neb. 509, it was distinctly decided that, in the case of a note given in payment of a piano sold with a warranty, evidence of the fundamental defense was properly excluded, for the reason that there was no tender made of proof that the plaintiff was not an innocent purchaser.

It would seem, from this review of the authorities, that the defendant, where fraud is pleaded, makes out his case simply by proof of the fraud, and that the plaintiff must affirmatively establish *bona fides*; but that, where the defense is failure of consideration, the defendant



must establish both failure of consideration and *mala fides* on the part of the plaintiff, or the fact that he was not a purchaser for value.<sup>6</sup> Now, in the case before us, the defendant pleaded both fraud and failure of consideration. When he opened his case, the situation was this: Should he succeed in showing that the instrument of assignment, brought to him by McCurday, purporting to be signed by both McCurday and wife, did not in fact bear Mrs. McCurday's genuine signature, and that the note was procured through the representation that such signature was genuine, then fraud would be established, and it would lie with the plaintiff to show his *bona fides* in the purchase of the note. If, on the contrary, the proof of this defense should fail, but the defendant should succeed in showing that he failed to obtain the property in question because Mrs. McCurday refused or failed thereafter to acknowledge the instrument, then there would be merely a failure of consideration, and the defendant, to prevail, would be required to attack plaintiff's *bona fides*. The burden of proof, therefore, depended upon the evidence introduced upon these issues. The order of proof rests within the discretion of the trial court. *Consaul v. Sheldon*, 35 Neb. 247. The court, therefore, did not err in allowing evidence of the fundamental defense to be introduced before evidence was offered as to the good faith of the purchaser. The court instructed the jury that the burden of proof was upon the defendant upon this issue, so there was nothing in this procedure of which the plaintiff can complain.<sup>7</sup>

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### III. Defenses to negotiable instruments.

#### § 94

#### CLARK v. PEASE.

41 NEW HAMPSHIRE, 414. — 1860.

ACTION by indorsee against maker on a promissory note. Defenses: duress by imprisonment; illegality because given to compromise a crime. The defendant offered evidence to substantiate the defenses.

The plaintiff excepted to this evidence, as no defense against the indorsee, without proof that he was not the *bona fide* holder of the note. But the court ruled that if the note was obtained by duress, it was void in the hands of an innocent indorsee, and thereupon the

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<sup>6</sup> This was also held to be the rule under the Negotiable Instruments Law in *Cole Banking Co. v. Sinclair*, 34 Utah, 454, where the court, after quoting sections numbered in New York 91, 98, 94, and 96, says that "the defense pleaded was not illegal, but merely partial failure of consideration. Failure or want of consideration does not constitute a defective title within the meaning of the foregoing provisions." P. 456. — C.

<sup>7</sup> The above case was approved in *Norwood v. Bank of Commerce of Lincoln*, 77 Neb. 205. — C.

plaintiff, admitting for the purposes of this trial that the defendant's witnesses would testify to the facts stated, a verdict for the defendant was taken by consent, subject to the opinion of the court; and the questions thus raised were reserved, and assigned to the determination of the whole court.

SARGENT, J. — That the case presented is clearly one of duress, there can be no question. The abuse of any process, either civil or criminal, to compel a party, by imprisonment, to do any act against his will except to pay the debt for which he is arrested, is entirely illegal, and the act may be avoided on the ground of duress. (*Richardson v. Duncan*, 3 N. H. 508; *Severance v. Kimball*, 8 N. H. 386; *Shaw v. Spooner*, 9 N. H. 197; *Burnham v. Spooner*, 10 N. H. 523; *Beck v. Blanchard*, 22 N. H. 303.) Here the arrest was without any warrant or lawful authority. Such duress is a perfect defense, upon all the authorities, to an action between the original parties.

The note in this case was not only void as between the original parties, on the ground of duress, but was given to compromise a charge of crime, and was wholly illegal upon that ground. (*Plumer v. Smith*, 5 N. H. 553.)

But the principal question raised here by the ruling of the court is, whether such a note is absolutely void in the hands of any holder; and if not, then another question arises upon the exception which was taken by the plaintiff, which is this: After an indorsee has made out a *prima facie* case by proving the indorsement, etc., and the defendant has shown that the note was obtained from him by duress, upon whom rests the burden of proof? Must the defendant prove that the plaintiff was not the *bona fide* holder, and that he did not pay a valid consideration for it, as the plaintiff claimed? or, the duress being proved, does that throw the burden of proof upon the plaintiff, to prove how he came by the note, and the consideration he paid, etc., as the defendant claims? We will examine these questions in the order in which we have stated them.

I. Is this note absolutely void in the hands of any holder, however innocent, who has paid a valid consideration for it before it was due?

[The court here discusses the grounds for avoiding contracts generally.]

Now bills and notes stand upon the same foundation as all other contracts do, in all the above respects, so long as they remain in the hands of the original payee. But bills and notes have another attribute, which other contracts ordinarily do not possess — that is, negotiability. Where a bill or note has been negotiated, and passed into the hands of a *bona fide* holder before it is due, and for a valuable consideration, in such case the holder acquires rights which did not belong to the payee. He stands in a different relation to the promisor. These additional rights and privileges have been conferred upon such holder by law, for good and sufficient reasons, too well known and understood

to need to be stated, but which are incident to, and dependent upon, the attribute of negotiability, which these instruments possess.

And it may be laid down as the general rule, as the general principle applying to this class of cases, that such a note, thus negotiated and in the hands of such a holder, is not liable to any defense which the maker had as against the original payee. To this general rule there are some exceptions,<sup>8</sup> among which are —

1. When a statute not only prohibits the making of a contract, but provides that the same shall be void to all intents and purposes; or where the law provides that any contract made or securities given upon any illegal consideration shall be absolutely void, then the note which embodies such contract, or is based upon such consideration, is held void everywhere and in the hands of every holder. In England, and in most of the United States, there are or have been laws against usury, which not only, by a general prohibition of usury, made that an illegal consideration for a note, but also provided that all bills or notes founded upon such a consideration should be absolutely void. Such, however, is not the law in this state on that subject, and it is believed that we have no statutes with similar provisions. Hence, here usury may be a good defense to a note as against the original party, but not as against an innocent indorsee, for value, etc.

2. When the note is a forgery, it is void everywhere.

3. When the maker belongs to a class of persons who are ordinarily, and as a general rule, on grounds of public policy, held incompetent to contract at all, such as infants, married women, alien enemies, and insane persons,<sup>9</sup> including spendthrifts and others under guardianship, who have been by some statute declared incompetent to contract.

4. Notes signed by agents without authority.

In none of these cases (except the first, which, as we have seen, does not apply in this State), is a note valid in the hands of anyone; and the party who discounts such paper is bound to inquire, at his peril, whether the note offered to him is signed by a party capable and competent in law to bind himself, or by an agent duly authorized to bind his principal. Besides this, he is bound to inquire whether the party from whom he receives it is competent to make such transfer in his own right, or is authorized to do it for his principal, for whom he assumes to act.

If there is a failure in either of these points of capacity or authority, it will not avail the party that he is a *bona fide* holder, for value, without notice. He must look to his indorser if he has one, and if he has not he must suffer loss.

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<sup>8</sup> These exceptions constitute what are known as real or absolute defenses. See Bigelow, Bills, Notes and Checks (Students' ed.), pp. 174-205. — H.

<sup>9</sup> See *Walker v. Winn*, 142 Ala. 560, reported in 4 A. & E. Ann. Cas. 537, with note entitled "Validity and effect of negotiable paper signed or indorsed by lunatic." — C.

5. Another case might be mentioned, which has been made an exception to the general rule above stated by express provisions of the statute, — as where a note is attached by the trustee process. There, by operation of the statute, the maker of a note may have a perfect defense against an indorsee, for value, without notice, and before due. So notes discharged by operation of insolvent laws might afterwards be transferred, by possibility, so as to form another exception, where the indorsee, holding the note *bona fide*, etc., might be met with a perfect defense on the part of the maker. But these last cases throw no light upon the question we are considering.

These are the principal, perhaps all the exceptions to the general rule stated above, that no defense is available against an innocent indorsee, for value paid before due.<sup>1</sup> But where the contract was illegal, being prohibited by law, or the consideration was illegal, as usury, wagers, compounding a felony, restraint of trade or of marriage, etc., or where there was a want or failure of consideration, and even where the note has been paid, — all these defenses,<sup>2</sup> and many more, cannot be made against the note in the hands of such a holder. And the question here raised is, whether, in case of duress, or fraud, where there is *mala fides*, but it is all on one side, and the other party to the note has been induced to sign it by force or by fraud, and is in every respect an innocent party, such defense shall avail him as against such a holder, for value, etc., who seeks to collect it.

And we think such a defense cannot avail the maker against such an indorsee of the note. The authorities favor this view. \* \* \*

Suppose an individual, then, were about to purchase a note payable to bearer, before it was due, and pay a fair equivalent for it, with a view of collecting it of the maker, and where he is to have no indorser to rely upon, — what would be his duty in order to proceed safely? First, he must assure himself of the genuineness of the signature, or, if it purported to be signed by an agent, he must

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<sup>1</sup> To these should be added the extinguishment of the instrument by cancellation or alteration. See Neg. Inst. L., §§ 204–206, *post*. The case of want of delivery, or want of delivery as and for a negotiable instrument, calls for special comment and may or may not be an absolute defense according as the maker is or is not estopped to set up the defense. See 1 Daniel on Neg. Inst., §§ 847–853. See *post*, pp. 387–399. — H.

<sup>2</sup> These defenses are known as personal, conditional, or “equitable” defenses. See Bigelow, Bills, Notes and Checks (Students’ ed.), pp. 172, 206. These defenses are fraud, duress, illegality, want or failure of consideration, release or payment, discharge of party primarily liable, etc. Whether a right of set-off existing at the time of the transfer is an “equity” is in dispute. 2 Daniel on Neg. Inst., §§ 1435a–1437. In New York it is an equity in case of the transfer of an overdue note. N. Y. Code Civ. Proc., § 502. — H. [On this last point, see *ante*, pp. 321–322. — C.]

assure himself that the agent was duly authorized to bind his principal in that particular; secondly, he must make such inquiries, which, ordinarily, he may easily do, as to ascertain that the signer is not an infant, a married woman, an alien enemy, an insane person, etc.,—that he does not belong to a class of persons who are always presumed by the law to be incompetent to contract; and thirdly, he might need, for his own safety, to inquire whether the signer of the note had been trustee, or whether any other special statute could affect his claim to it. When he has satisfied himself upon these points, if he learns of no other defects, and the signer is of sufficient ability to respond, he may purchase; and there is generally very little trouble in ascertaining these facts. They are usually matters of public notoriety, about which there can be little room for mistake.

But, suppose that after being satisfied upon all these points, and having purchased the note, it should prove that it was an illegal contract, or was for an illegal consideration,—who shall suffer?—the maker or the indorsee? This is settled on the best of authority. The original parties stood upon equal ground, both being in fault, and could neither of them enforce the contract; yet neither shall be allowed to take advantage of his own wrong as against an innocent indorsee.

And suppose it should turn out that his note was obtained of the maker by fraud or by duress, a case in which the maker was in no fault,—what rule shall be applied here?—the long established one, that where one of two innocent persons must suffer, the loss should fall upon him who has suffered a negotiable security, with his name attached to it, to get into circulation, and thereby mislead the indorsee. Such rules, and such an application of them, are necessary to give security to negotiable paper.

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The exception to the ruling of the court upon this point must be sustained; but we shall find that the numerous authorities which bear upon the next question to be considered have also a direct bearing upon this point.

§ 98 II. Next let us inquire, upon whom is the burden of proof, after duress, or fraud, or illegality of consideration is proved? Must the defendant not only prove that he had a perfect defense to the note originally, but also show that the indorsee had notice of the defect, or that he paid no consideration for it, or that he is not in some way the *bona fide* holder of the note? Or must the plaintiff, after such defense to the original contract is proved, assume the burden of proving that he is a *bona fide* holder, for a valuable consideration, without notice of any defect, and that it came seasonably into his hands?

[After discussing various authorities.]

The same doctrines very generally prevail in this country, wherever

the subject has received judicial consideration. (*Munroe v. Cooper*, 5 Pick. 412; *Woodhul v. Holmes*, 10 Johns. 231; *Vallett v. Parker*, 6 Wend. 615; *Small v. Smith*, 1 Den. 583; *Worcester Co. Bank v. D. & M. Bank*, 10 Cush. 488; *Wyer v. D. & M. Bank*, 11 Cush. 52; *Rockwell v. Charles*, 2 Hill, 499; *Bissell v. Morgan*, 11 Cush. 198; *Crosby v. Grant*, 36 N. H. 273.) So in *Smith on Cont.* (3d Am. ed. 277), in a note by Rawle, it is said that in New York it has been held that, as soon as the defendant shows there has been usury between the prior parties, he casts on the plaintiff the burden of proving that he is a holder for value, — as is the case in every instance where fraud, duress, or illegality is shown between the prior parties.

These authorities would seem conclusive, that the plaintiff's exception, — that the evidence offered would have been no defense unless it were proved that he was not the *bona fide* holder, — must be overruled. When the defendant had proved the duress, he had made a good defense as against the original party; and because of the legal presumption that in such cases the payee, being guilty of such illegality, would dispose of the note and place it in the hands of some other person to sue upon it (*Bailey v. Bidwell*, ante), he had thereby cast a suspicion on the plaintiff's title, which threw the burden upon him of showing affirmatively that he was a *bona fide* holder for value. Nor can we see that the fact that this evidence was offered under the general issue alters the position of the parties or the state of the case.

These authorities also bear directly upon the first point taken by the defendant, that duress is a defense against any holder, however innocent he may be, and however valuable a consideration he may have paid for the note; and if other authorities on this point were needed, they are not wanting. In *Powers v. Ball* (27 Vt. 662), Redfield, C. J., says, "Illegality, duress, fraud, and want or failure of consideration, are no defense as against a *bona fide* holder for value." (See, also, *St. Albans Bank v. Dillon*, 30 Vt. 122; *Ellicott v. Martin*, 6 Md. 509; *Minell v. Reed*, 26 Ala. 730; *Norris v. Langley*, 19 N. H. 423; *Knight v. Pugh*, 4 Watts & Serg. 445.)

The verdict must be set aside, and a new trial granted.

## § 96 GEORGE ALEXANDER AND CO. v. HAZELRIGG.

123 KENTUCKY, 677. — 1906.

**ACTION on note.** The answer set up as one defense that the note was executed "in payment of a bet or wager \* \* \* and the consideration \* \* \* under the law of Kentucky is vicious, illegal,

and void." Plaintiff's demurrer to this defense was overruled, and as he declined to plead further, judgment was rendered against him, and he appealed.

NUNN, J. \* \* \*

The real question to be determined is whether a negotiable note executed for money lost on a bet or wager can be successfully defended, when owned and held by an innocent purchaser for value without notice of the infirmity or illegal consideration of the note. As we understand the appellant's petition, he concedes that prior to the passage and the taking effect of the Negotiable Instruments Act, referred to, such a note could be successfully defended in the hands of an innocent purchaser; but since that act took effect he contends that all laws inconsistent with that act stood repealed. He claims that under section 57<sup>3</sup> the question of consideration cannot be inquired into as against the holder in due course. He takes the paper free from defenses. And in support of this position we are referred to the case of *Wirt v. Stubblefield*, 17 App. D. C. 283. In that case it was held that the section, the same as section 57 referred to above, changed the law of the District of Columbia as to a note given for a gambling debt in the hands of a holder in due course; the court saying: "We know, moreover, that the great and leading object of the act, not only with Congress, but with the larger number of the principal states of the Union that have adopted it, has been to establish a uniform system of law to govern negotiable instruments wherever they might circulate or be negotiated. It was not only uniformity of rules and principles that was designed, but to embody in a codified form, as fully as possible, all the law upon the subject, to avoid conflict of decisions, and the effect of mere local laws and usages that have hitherto prevailed. The great object sought to be accomplished by the enactment of the statute is to free the negotiable instrument as far as possible from all latent local infirmities that would otherwise inhere in it to the prejudice and disappointment of innocent holders as against all the parties to the instrument professedly bound thereby. This clearly could not be effected so long as the instrument was rendered absolutely null and void by local statute."

It has been the policy of this state to suppress gaming, and the statutes making gaming contracts void are founded upon what the Legislature has for many years deemed to be sound public policy. It is inconceivable that the General Assembly, in the passage of the Act of 1904 for the protection of innocent holders of negotiable instruments, intended to or did repeal section 1955, Ky. St. 1903, which declares all gaming contracts void.\* In our opinion, the disappoint-

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<sup>3</sup> N. Y., § 96. — C.

\* Similarly, it was held in *Lawson v. First Nat. Bank of Fulton*, 102 S. W. (Ky.) 324, that Ky. St. 1903, § 4223, making void a pedler's note unless

ment now and then of an innocent holder of a negotiable instrument would not be as hurtful and injurious to the best interests of the state as the removal of the ban from gaming contracts. Mr. Daniel in his work on Negotiable Instruments (section 197) says: "The *bona fide* holder for value, who has received the paper in the usual course of business, is unaffected by the fact that it originated in an illegal consideration, without any distinction between cases of illegality founded in moral crime or turpitude, which are terms *mala in se*, and those founded in positive statutory prohibition, which are termed *mala prohibita*. The law extends this peculiar protection to negotiable instruments, because it would seriously embarrass mercantile transactions to expose the trader to the consequences of having a bill or note passed to him impeached for some covert defect. There is, however, one exception to this rule — that when a statute, expressly or by necessary implication, declares the instrument absolutely void, it gathers no vitality by its circulation in respect to the parties executing it." In the case of *Sondheim v. Gilbert*, 117 Ind. 71, the court said: "In order, therefore, to uphold a judgment which invalidates commercial paper in the hands of innocent holders, such as plaintiffs are conceded to be, it is essential that a statute should be shown governing the case, which in direct terms declares that transactions such as those here involved are unlawful, and that notes given under circumstances exhibited by the facts in this case are absolutely void. The principle may be considered as well established that when a statute in express terms pronounces contracts, bills, securities, and the like, resulting from or growing out of wagering or gambling transactions, which are prohibited by statute, absolutely void, no recovery can be had thereon; and the doctrine that transactions which a statute in direct terms declares to be unlawful cannot acquire validity by the transfer of commercial paper based thereon, which is also under direct legislative denunciation, is fully supported by authorities." And the authorities are referred to, and the court continues: "In

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indorsed with the word's "Pedler's note" is not repealed by implication by the Negotiable Instruments Law. Speaking of this latter statute the court said: "The whole scope of it is shown to be the dealing with commercial paper, so as to protect innocent purchasers of such against mere defenses available as between the original parties. It gives such paper currency, free from original defenses. But it applies only to paper that might have been obligatory between the parties. But, where the parties were never bound because the law made the note void, as contrary to public policy as expressed in the statutes, the Negotiable Instruments Act does not apply, and ought not to. The prevention of crime is of more importance than the fostering of commerce. The latter act should be read in view of its purpose, and not as intending to repeal other statutes passed in the exercise of the police power of the state to suppress crime and fraud."

See also the extract from the opinion of CULLEN, C. J., in *Schlesinger v. Gilhooly*, 189 N. Y. 1, given in note on p. 379. — C.



such a case, the note will be declared void in the hands of an innocent holder." In the case of *Bohon's Assignees v. Brown, etc.*, 101 Ky. 355, the court said: "In the case of *Cochran v. German Insurance Bank*, 9 Ky. Law Rep. 196, the Superior Court held that 'a bill or note based upon a gambling consideration is absolutely void, and the drawer or maker is not bound to even an innocent holder.' And in the case of *Farmers' & Drovers' Bank of Louisville v. Unser*, 13 Ky. Law Rep. 966, the court says: 'The whole current of authority is that the obligor may insist upon the illegality of the contract or consideration, notwithstanding the note is in the hands of an innocent holder for value, in all those cases in which he can point to an express declaration of the Legislature that such an illegality makes the contract void.'"

For these reasons, the judgment of the lower court is affirmed.<sup>5</sup>

## § 96

## SCHLESINGER v. LEHMAIER.

191 NEW YORK, 69. — 1908.

HAIGHT, J. This action was brought by the receiver of the Federal Bank, a domestic corporation engaged in the banking business in the city of New York, to recover the amount of two promissory notes made by the defendant for \$500 and \$454.50, respectively, each made payable to the order of the maker and indorsed by him. The complaint alleges that before maturity the notes were discounted by the Federal Bank, and that the plaintiff as receiver now holds them. The answer, in substance, alleges that the notes described in the complaint were made by the defendant and delivered to the Globe Security Company in payment for another note of the defendant held by that company and for the sum of \$135.50 interest, which sum was far in excess of interest at the legal rate and was, therefore, usurious, and that the Federal Bank subsequently discounted the notes and received them, with full knowledge of the payment of such usurious rate of interest. Upon the trial the City Court awarded judgment for the plaintiff, holding that the facts alleged and set forth in the answer did not in law constitute a defense to the action.

We are again called upon to construe the provisions of the National Banking Act, so called, and our own Banking Law, based thereon, which is as follows: "Every bank and private and individual banker doing business in this state may take, receive, reserve and charge on every loan and discount made, or upon any note, bill of exchange or other evidence of debt, interest at the rate of six per centum per annum; and such interest may be taken in advance, reckoning the days

<sup>5</sup> See exhaustive note in 119 Am. St. Rep. 172, entitled "Defenses to notes and other obligations given for gambling debts." — C.

for which the note, bill or evidence of debt has to run. The knowingly taking, receiving, reserving or charging a greater rate of interest shall be held and adjudged a forfeiture of the entire interest which the note, bill or evidence of debt carries with it, or which has been agreed to be paid thereon. If a greater rate of interest has been paid, the person paying the same or his legal representatives may recover back twice the amount of the interest thus paid, from the bank and private or individual banker taking or receiving the same, if such action is brought within two years from the time the excess of interest is taken.

\* \* \* The true intent and meaning of this section is to place and continue banks, and private and individual bankers on an equality in the particulars herein referred to with the national banks organized under the act of Congress entitled 'An act to provide a national currency secured by pledges of United States bonds, and to provide for the circulation and redemption, thereof,' approved June the third, eighteen hundred and sixty-four." (L. 1870, ch. 163; L. 1892, ch. 689, § 55, as amended by L. 1900, ch. 310, § 1.)

The general statutes of our state forbid the taking of interest upon the loan of money in excess of the rate prescribed by law, and also render void all bonds, notes and other contracts given to secure a loan made in violation thereof. (2 R. S. 772, §§ 2, 5; L. 1837, ch. 430, § 1.) These statutes still remain in full force as to individuals<sup>6</sup> and corporations except in so far as they have been modified or superseded by the Banking Law enacted for the benefit of banking corporations and private and individual bankers, but the precise extent of such modification is a question involving some difficulty in its solution and has already been the subject of discussion in this court. In the case of *Schlesinger v. Gilhooly* (189 N. Y. 1) the construction of the National Banking Act and of our state Banking Law was discussed in two opinions, one written by Cullen, Ch. J., and the other by Vann, J., in which the chief judge reached the conclusion that the statutes referred to only applied to cases where the banks had been paid an unlawful rate of interest and that they had no application to negotiable paper purchased by the banks which had previously been tainted with usury; while Vann, J., reached the conclusion that these statutes extended to and covered negotiable paper purchased by the bank before maturity in good faith without knowledge of its previous taint. Two of my associates concurred with the chief judge and two concurred with Judge Vann. Willard Bartlett, J., concurred with Judge Vann in the result, upon the ground that, under the Negotiable Instruments Law, a *bona fide* purchaser takes a note free from the defense of usury.<sup>7</sup> The judgment was, therefore, affirmed, thus hold-

<sup>6</sup> But see extract from *Klar v. Kostiuk*, 65 Misc. (N. Y.) 199, in note 7 on p. 380. — C.

<sup>7</sup> In *Schlesinger v. Gilhooly*, 189 N. Y. 1, 33, CULLEN, C. J., said: "I shall not discuss at any length the effect of the Negotiable Instruments Law. . . .

ing that, where a bank has in good faith discounted negotiable paper for value before maturity without notice that it was already void for usury, the defense of usury is not available, and that must now be regarded as the law of this state.

The question we now have presented was not disposed of in the former case, and is quite different. It is now contended that the bank may purchase void paper of the holder, with full knowledge that the maker has been compelled to pay a usurious rate of interest, and that by such purchase the paper becomes validated, and in the hands of the bank may be collected of the maker. If such an interpretation is adopted, then it practically nullifies our usury laws, for any person who has exacted usury for the loan of money may take his paper into a bank and arrange for its prosecution and thus evade the defense of usury. The decision of our court in the case of *Schlesinger v. Gilhooly* (*supra*) has already eliminated from our usury statutes their most drastic features, so far as banks are concerned, and no longer can a person put in circulation negotiable paper void for usury, which may be transferred to innocent banks who purchase in good faith without knowledge of its taint, and thus be deprived of the right to collect it from the maker.

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I think that under well settled principles of statutory construction we cannot construe its general language as repealing the provisions of the usury, gaming and lottery laws, which render obligations given on such considerations absolutely void. The Negotiable Instruments Law applies only to commercial paper, and the effect of the usury and gaming statutes, like that relating to patent rights, is to withdraw notes given on such considerations from the domain of negotiable instruments. (*Eastman v. Shaw*, 65 N. Y. 522.)"

But see the following extract from the case of *Klar v. Kostiuk*, 65 Misc. (N. Y. Sup. Ct., App. T.) 199, decided in November, 1909, where the court took the contrary view of the effect of the Negotiable Instruments Law:

"GILDERSLEEVE, J. . . . Until the enactment of section 96 of the Negotiable Instruments Law, in respect to notes having a usurious inception, and the decisions in *Schlesinger v. Gilhooly*, 189 N. Y. 1; *Schlesinger v. Lehmaier*, 191 id. 69, and *Schlesinger v. Kelly*, 114 App. Div. 546, there was no uncertainty about the law in this state in respect to notes usuriously given. It was plainly declared in *Claffin v. Boorum*, 122 N. Y. 385. The court said: 'A note void in its inception for usury continues void forever, whatever its subsequent history may be.' Section 96 of the Negotiable Instruments Law provides as follows: 'A holder in due course holds the instrument free from any defect of title of prior parties and free from defenses available to prior parties among themselves and may enforce payment of the instrument for the full amount thereof against all parties liable thereon.'

"We think it was the purpose of the legislature in enacting this provision to make a radical change in the law of this state affecting negotiable paper, and that the law now is that a *bona fide* holder in due course holds the note free from any taint of usury. The *Schlesinger* cases, *supra*, unmistakably and specifically declare the law to be that a bank acquiring in good faith, for value, commercial paper, void between the parties for usury, may recover thereon. We see no reason why the provision under consideration does not apply to, and may not be invoked by, individuals as well as banks. In *Wirt v. Stubblefield*,

Until a recent amendment of section 378 of the Penal Code the acceptance of an unlawful rate of interest for the use or loan of money was a misdemeanor and punishable criminally. The taking of usury is still a wrong and against the public policy of the state. If the statutes are to receive the construction contended for, then the officers of a bank may become parties to a wrong and, against the policy of the state, aid the wrongdoers in their receipt of usury by the taking of such paper and practically collecting it for them. Assuming, for the purposes of the argument, that national and state banks are governmental agencies, and that among the powers given to banks, either state or federal, is that of purchasing negotiable paper, and that in the discharge of such powers they are entitled to protection, evidently such protection was only intended to apply in so far as the officers of such banks acted in good faith in accordance with the law, and not where they departed therefrom and knowingly and intentionally joined with wrongdoers in an attempt to evade the laws.

The learned Appellate Division appears to have entertained the view that the purchase of commercial paper with knowledge that it was void for usury did not place the bank in a worse position than it would have been in had it taken usurious interest itself. The answer to this is that the statute makes it different. The usury laws, as

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17 App. D. C. 283, the court, in construing the same provision enacted by Congress for the District of Columbia as the Negotiable Instruments Law, took the view that we have adopted and made no distinction between individuals and banks.

"We think Mr. Justice LAUGHLIN, in *Schlesinger v. Kelly*, *supra*, correctly stated the law of this state, when he said: 'The usury laws remain in full force, but to facilitate the free circulation of negotiable paper by protecting holders thereof in due course for value in their right to enforce the same, the usury laws are to that extent superseded by the provisions of section 96 of the Negotiable Instruments Law.'

"SEABURY, J. (concurring). I concur in the opinion of Mr. Justice GILDER-SLEEVE in so far as that opinion holds that the enactment of section 96 of the Negotiable Instruments Law changed the existing law, and that under the provisions of the Negotiable Instruments Law the defense of usury cannot be set up against a *bona fide* holder. I think that the correct interpretation of that law was first given by Mr. Justice Laughlin in *Schlesinger v. Kelly*, 114 App. Div. 546. It seems to me that *Schlesinger v. Gilhooly*, 189 N. Y. 1, left this question undetermined, and that we are now at liberty to adopt the views expressed by Mr. Justice Laughlin in the *Kelly* case and by Judge Willard Bartlett in *Schlesinger v. Gilhooly*, *supra*."

LEHMAN, J., wrote a dissenting opinion.

It must be observed, however, that the decision in *Klar v. Kostiuk*, *supra*, is that of an inferior appellate court, and in the face of the contrary doctrine maintained by the N. Y. Court of Appeals prior to the enactment of the Negotiable Instruments Law, and the dicta in the opinions of that court in the *Schlesinger* cases in 189 N. Y. 1, and 191 N. Y. 69 (reported herein at p. 378), subsequent to the enactment of that statute, it is doubtful whether that decision will be followed by the latter court when the question comes squarely before it. — C.

between individuals, have not been changed, and as between the maker and the holder, if usury is exacted, the paper is still void and no recovery can be had thereon.<sup>8</sup> Not so, however, with banks which have received unlawful interest; the paper is not affected or rendered void, but the bank is subjected to a forfeiture of all interest and to penalties for that which it has received. In *Caponigri v. Altieri* (165 N. Y. 255) we held that the penalties could be collected in an action brought for that purpose, but how could such an action be maintained against the Federal Bank upon the paper in question? It has received no unlawful rate of interest. It has not violated any statute in this regard. The unlawful interest was collected by the Globe Company before the bank had become the purchaser of the paper. That company was not a banking corporation, and consequently is not liable for the penalties provided by the Banking Law. True, it forfeits its right to collect the balance remaining due upon the paper, and it may be liable for the interest received in excess of the legal rate; but, under the view of the Appellate Division, the maker would be deprived of his defense of usury, and also of his right to maintain an action for the penalties provided by the Banking Law. To my mind, the legislature never intended such an interpretation of the act. It pertains to negotiable instruments, and should be construed in connection with the other legislation upon the same subject. In the Negotiable Instruments Law it is expressly provided that a holder, who becomes such before maturity in good faith and for value without notice of any infirmity, holds the same "free from any defect of title of prior parties and free from defenses available to prior parties among themselves, and may enforce the payment of the instrument for the full amount thereof against all parties liable thereon." Here we have the legislative intent expressed in clear and unmistakable language. It establishes a just and proper rule which protects the bank in making purchases of commercial paper in good faith before maturity, for value and without notice of infirmity. But where it purchases with actual knowledge of the infirmity or defect, or knowledge of such facts that its action in taking the instrument amounted to bad faith, it is not protected.

I am, therefore, of the opinion that the matter set forth in the answer is sufficient in law to constitute a defense and that, consequently, the judgment of the Appellate Division should be reversed and the order of the Appellate Term affirmed, with costs to appellant in the Appellate Division and this court.

CULLEN, Ch. J. I concur in the opinion of my brother HAIGHT for reversal, but deem it proper to add a word explanatory of my position. In the case of *Schlesinger v. Gilhooly* (189 N. Y. 1) I dis-

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<sup>8</sup> But see extract from *Klar v. Kostiuk*, 65 Misc. (N. Y.) 199, in note 7 on p. 380. — C.

sented from the decision in an opinion. While I retain the views then expressed, I recognize fully the effect of the decision there made and accept it as a binding authority declaring the law to be that a bank acquiring, in good faith for value, commercial paper void between the parties for usury, may recover thereon. In that case, however, the recovery was sought to be upheld on two separate grounds, the Banking Laws, state and national, and the Negotiable Instruments Law. Had a majority of the court placed their decision on either ground I should have felt the decision binding not only as to the point actually decided, but as to the propositions on which the decision was founded. I understand, however, that while my opinion in its entirety commanded the assent of two only of my associates, the member of the majority who based his decision on the effect of the Negotiable Instruments Law expressed his approval in that part which dealt with the effect of the Banking Laws, though it may be that approval was obiter, his action proceeding on a different question. Therefore, for the reasons stated in my former opinion as well as for those stated in the opinion of my brother HAIGHT, now rendered, I concur in the reversal of the judgment appealed from.

WILLARD BARTLETT, J. I concur in the opinion of HAIGHT, J., for reversal—having concurred with the opinion of the chief judge in *Schlesinger v. Gilhooly* (189 N. Y. 1), except as to the effect of the Negotiable Instruments Law, although the statement of such concurrence was inadvertently omitted from the report of that case.

WERNER and HISCOCK, JJ., concur with HAIGHT, J., and CULLEN, Ch. J., and WILLARD BARTLETT, J., also concur in memoranda with HAIGHT, J.; GRAY and CHASE, JJ., dissent.

Judgment accordingly.<sup>9</sup>

## § 96

### ARND v. SJOBLÖM.

131 WISCONSIN, 642. — 1907.

SUIT on promissory note. Plaintiff gave evidence that he was an innocent purchaser for value before due with no notice of any defense or invalidity. It was stipulated that the note was in fact given in payment for lightning rods erected upon defendant's buildings in accordance with a prior written contract made by the defendant, whereupon, on motion of defendant, judgment of nonsuit was entered dismissing the action, from which the plaintiff appeals.

DODGE, J. The constitutionality of ch. 438, Laws of 1903, as applied to notes given for lightning rods, is settled by *Quiggle v. Her-*

<sup>9</sup> This case is reported with a note in 16 L. N. S. 626, and the *Gilhooly* case, 189 N. Y. 1, is reported with a note in 12 A. & E. Ann. Cas. 1138. For a discussion of these two cases, see 15 Case and Comment, 130. — C.

man, 131 Wis. 379, marking the distinction from its application to patent rights considered in *J. H. Clark Co. v. Rice*, 127 Wis. 451.<sup>1</sup> \* \* \*

Conceding, for the purposes of the discussion, that because the giving of a note for lightning rods without red-ink declaration of its consideration upon its face is in defiance of ch. 438, Laws of 1903, it is thereby rendered invalid, as we have decided is a note executed on Sunday (*Howe v. Ballard*, 113 Wis. 375, and *Brown v. Gates*, 120 Wis. 349), does it necessarily follow that an innocent holder for value cannot recover thereon? It was early decided by this court that a negotiable note, invalid between the original parties because given in defiance of a statutory prohibition accompanied by a penalty — *i. e.* one given on Sunday, but dated on Saturday,— would be enforced in the hands of an innocent holder having no knowledge of the illegal fact upon the ground of estoppel against the maker to assert such fact. *Knox v. Clifford*, 38 Wis. 651. The same principle has been invoked to support a usurious negotiable note in the hands of an innocent holder, although the statute declared it “void.” *Sage v. McLaughlin*, 34 Wis. 550, 556. The general grounds upon which estoppel *in pais* rests are described in *Marling v. Nommensen*, 127 Wis. 363, 369. Hardly anything is more to be anticipated than that a negotiable note will be negotiated upon the faith of what appears upon its face (*Loizeaux v. Fremder*, 123 Wis. 193, 198); and the very issue of such paper without suggestion of any facts affecting its validity must be expected by every reasonable person to lead any purchaser to assume their nonexistence. The doctrine of *Knox v. Clifford*, *supra*, has been acted on by numerous other courts. *Cranson v. Goss*, 107 Mass. 439; *Vinton v. Peck*, 14 Mich. 287; *Hall v. Parker*, 37 Mich. 590, 594; *Johns v. Bailey*, 45 Iowa, 241, 245; *Leightman v. Kadetska*, 58 Iowa, 676; *New v. Walker*, 108 Ind. 365,— the last case being decided under substantially the same statute as the one now

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<sup>1</sup> Chapter 438. Laws of 1903, is now to be found in the following sections of the Wisconsin Negotiable Instruments Law:

“Section 1675-la. All promissory notes and other evidences of indebtedness, taken or given for any lightning rod, patent, patent right, stallion or interest therein, as the case may be, shall have written or printed thereon in red ink the words: ‘The consideration of this note is the sale of a lightning rod, patent, patent right, stallion, or interest therein, as the case may be.’”

“Section 1675-lb. Any person who shall sell a lightning rod, patent, patent right or stallion, or any interest in a lightning rod, patent, patent right, or stallion, who shall take a promissory note or other evidence of indebtedness for the whole or any part of the consideration thereof, and who shall fail to state the consideration for said note as provided by section 1 of this act, or in words of similar import, shall be liable to a penalty equal to the face of the note so taken.

“Section 1675-lc. All notes or other evidences of indebtedness taken as the whole or a part of the consideration for any lightning rod, patent, patent right, stallion, or interest therein, which shall express upon their face the

invoked. Other decisions affirming the validity of commercial paper in hands of innocent holder, notwithstanding illegality and consequent original invalidity, are *Union T. Co. v. Preston Nat. Bank*, 136 Mich. 460;<sup>2</sup> *Traders' Bank v. Alsop*, 64 Iowa, 97; *Johnson v. Meeker*, 1 Wis. 436, 441; *Mack v. Prang*, 104 Wis. 1; *Keller v. Schmidt*, 104 Wis. 596, 602. We feel no doubt that the principle of *Knox v. Clifford* is sound and supports the right of this appellant to recover upon the facts as they appeared at the time of the nonsuit.

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consideration for which they are taken, as required by section 1 of this act, shall be non-negotiable, and be subject to all the defenses in the hands of an innocent holder that the same would have if not transferred."

The above statute was held unconstitutional so far as it relates to patents and patent rights in *J. H. Clarke Co. v. Rice*, 127 Wis. 451; but constitutional as to the provision relating to stallions in *Quiggle v. Herman*, 131 Wis. 379, and as to the provision relating to lightning rods in the case to which this is a note.

Several states have provisions of a similar nature relative to negotiable instruments given for patent rights either incorporated in their Negotiable Instruments Acts (as, for example, N. Y., § 330) or found in independent statutes. The Arkansas statute (Kirby's Dig., §§ 513-516) was held constitutional in *Woods v. Carl*, 203 U. S. 358, affirming 75 Ark. 328, and in *Ozan Lumber Co. v. Union Co. Bank*, 207 U. S. 251, reversing 145 Fed. 344. The New York Act (now Neg. Inst. Law, § 330) was held constitutional in *Herdie v. Roessler*, 109 N. Y. 127. For decisions on the constitutionality of similar acts in other states, see the cases in the note to *Woods v. Carl*, 75 Ark. 328, in 5 A. & E. Ann. Cas. 426. — C.

<sup>2</sup> In *Union Trust Co. v. Preston Nat. Bank*, 136 Mich. 460, it was held that certain sections of the Michigan Banking Law forbidding and making it a crime for a bank officer or employee to certify a check when the amount thereof does not stand to the credit of the drawer on the books of the bank, do not make a check so certified invalid in the hands of a *bona fide* holder for value. CARPENTER, J., said: "It by no means follows, however, because a contract made in violation of law, common or statutory, is void between the original parties, that, if given the form of negotiable paper, it is void in the hands of a *bona fide* holder. Indeed, it is the distinguishing characteristic of the law of negotiable paper that, when a contract takes that form, it is not, in the hands of a *bona fide* holder, subject to the defense which avoided it in the hands of the original parties. Negotiable paper in the hands of a *bona fide* holder is not open to the defense that the contract from which it arose was illegal or forbidden by the principles of the common law. . . . Nothing less than a statutory enactment will subject negotiable paper in the hands of a *bona fide* holder to the defense of illegality in its inception. What, then, is the effect of a statute which merely prohibits the making of a particular contract, and punishes its making as a crime? [P. 469.] . . . We conclude, therefore, that, though the making of a contract is prohibited and made a crime by statute, yet that contract, if it takes the form of negotiable paper, is valid in the hands of a *bona fide holder for value*." P. 470. See this case reported in 4 A. & E. Ann. Cas. 347, with note entitled "Validity in hands of *bona fide* holder of negotiable contract void by statute between original parties."

In *Gray v. Boyle*, 55 Wash. 578, it was held that (quoting the headnote): "Laws 1905, p. 373, prohibiting insurance rebates does not invalidate a note given for the premiums in violation of the statute, as against a holder of the



Further than this, our negotiable instruments statute, section 1676-27,<sup>3</sup> Stats. (Supp. 1906; Laws of 1899, ch. 356), provides:

"A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon except as provided in sections 1944 and 1945 of these statutes, relating to insurance premiums, and also in cases where the title of the person negotiating such instrument is void under the provisions of section 1676-25 of this act."

Section 1676-25<sup>4</sup> applies only to the case where the signer did not know the nature of the instrument and could not have obtained such knowledge by the use of ordinary care. Sections 1944, 1945, refer to a note given for an insurance premium, which by said sections is required to bear upon its face a declaration of its consideration, and omission thereof is penalized. But for these express exceptions the provision is general that the innocent holder may enforce payment for the full amount free from defenses available between the original parties. Such specific exceptions strongly indicate that no others were intended. We cannot escape the conclusion that this statute supports plaintiff's right of recovery.<sup>5</sup>

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note in due course; since it is not the policy of the law to render negotiable paper void in the hands of innocent holders where the statute has not so expressly declared."

Similarly, it was held in *Citizens' St. Bank v. Nore*, 67 Neb. 69, that (quoting the headnote): "In this state a statute will not be construed so as to make a negotiable instrument void in the hands of a *bona fide* purchaser unless the act specifically so declares. A note given for medical services by an unlicensed practitioner may be recovered on by a *bona fide* purchaser, notwithstanding the provisions of chapter 55 of the Compiled Statutes, prohibiting the practice of medicine without a license." — C.

<sup>3</sup> This section is the same as section 96 of the N. Y. Neg. Inst. Law through the words "against all parties liable thereon;" the balance of the section is found only in the Wisconsin statute. — C.

<sup>4</sup> This section is in substance the same as section 94 of the N. Y. Neg. Inst. Law except for the addition of the following words found only in the Wisconsin statute: "and the title of such person is absolutely void when such instrument or signature was so procured from a person who did not know the nature of the instrument and could not have obtained such knowledge by the use of ordinary care." Referring to these additional words, the court, in *Aukland v. Arnold*, 131 Wis. 64, at p. 67, said: "In terms it expresses the rule of law recognized in the decisions of this court when it was enacted, which was to the effect that, when a signature to a negotiable instrument is obtained by falsely and fraudulently misrepresenting its character, and the person signing it could not have obtained knowledge of the falsity and fraud by the use of ordinary care, this makes the title to the instrument absolutely void as to such signer. *Butler v. Carns*, 37 Wis. 61; *Walker v. Ebert*, 29 Wis. 194 [reported herein at p. 387]; *Keller v. Ruppold*, 115 Wis. 536; *Franklin v. Killilea*, 126 Wis. 88." — C.

<sup>5</sup> As an authority in other states upon the proper construction and effect of the Negotiable Instruments Law, this decision loses much of its value

BY THE COURT. — Judgment reversed, and cause remanded for new trial. <sup>6</sup>

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## § 94

## WALKER v. EBERT.

29 WISCONSIN, 194. — 1871.

ACTION against maker of a promissory note, by a holder who claims to have purchased it for full value, before maturity. Defense: that defendant is a German unable to read and write the English language; that the payees fraudulently induced him to sign an instrument represented to him to be a contract of agency, but which in fact was the promissory note in question. Evidence to establish this defense ruled out, and judgment given for plaintiff. Defendant appeals.

DIXON, C. J. — The defendant, having properly alleged the same facts in his answer, offered evidence and proposed to prove by himself as a witness on the stand, that at the time he signed the supposed note in suit, he was unable to read or write the English language; that when he signed the same, it was represented to him as, and he believed it was, a certain contract of an entirely different character, which contract he also offered to produce in evidence; that the contract offered to be produced was a contract appointing him, defendant, agent to sell a certain patent right, and no other or different contract, and not the note in question; and that the supposed note was never delivered by the defendant to any one. It was at the same time stated that the defendant did not claim to prove that the plaintiff did not purchase the supposed note before maturity and for value. To this evidence the plaintiff objected, and the objection was sustained by the court, and the evidence excluded, to which the defendant excepted; and this presents the only question.

We think it was error to reject the testimony. The two cases cited by counsel for the defendant (*Foster v. McKinnon*, L. R. 4 C. P. 704, and *Whitney v. Snyder*, 2 Lansing, 477) are very clear and explicit upon the point, and demonstrate, as it seems to us, beyond any rational doubt, the invalidity of such paper, even in the hands of a holder for value, before maturity, without notice. The party whose signature to such paper is obtained by fraud as to the character of the paper itself, who is ignorant of such character, and has no intention of signing it, and who is guilty of no negligence in affixing his signature, or in not ascertaining the character of the instrument, is no more bound by it than if it were a total forgery, the signature included.

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because it is based, at least in part, upon the provisions in the Wisconsin statute referred to in notes 3 and 4, *supra*, not found in the statutes of the other states. — C.

<sup>6</sup> This case is reported with notes in 10 L. N. S. 842, and in 11 A. & E. Ann. Cas. 1179, continuing note in 4 A. & E. Ann. Cas. 353. — C.

The reasoning of the above cases is entirely satisfactory and conclusive upon this point. The inquiry in such cases goes back of all questions of negotiability, or of the transfer of the supposed paper to a purchaser for value, before maturity and without notice. It challenges the origin or existence of the paper itself; and the proposition is, to show that it is not in law or in fact what it purports to be, namely, the promissory note of the supposed maker. For the purpose of setting on foot or pursuing this inquiry, it is immaterial that the supposed instrument is negotiable in form, or that it may have passed to the hands of a *bona fide* holder for value. Negotiability in such cases presupposes the existence of the instrument as having been made by the party whose name is subscribed; for, until it has been so made and has such actual legal existence, it is absurd to talk about a negotiation, or transfer, or *bona fide* holder of it, within the meaning of the law merchant. That which, in contemplation of law, never existed as a negotiable instrument, cannot be held to be such; and to say that it is, and has the qualities of negotiability; because it assumes the form of that kind of paper, and thus to shut out all inquiry into its existence, or whether it is really and truly what it purports to be, is *petitio principii*—begging the question altogether. It is, to use a homely phrase, putting the cart before the horse, and reversing the true order of reasoning, or rather preventing all correct reasoning and investigation, by assuming the truth of the conclusion, and so precluding any inquiry into the antecedent fact or premise, which is the first point to be inquired of and ascertained. For the purposes of this first inquiry, which must be always open when the objection is raised, it is immaterial what may be the nature of the supposed instrument, whether negotiable or not, or whether transferred or negotiated, or to whom or in what manner, or for what consideration or value paid by the holder. It must always be competent for the party proposed to be charged upon any written instrument, to show that it is not his instrument or obligation. The principle is the same as where instruments are made by persons having no capacity to make binding contracts; as, by infants, married women, or insane persons; or where they are void for other cause, as, for usury; or where they are executed as by an agent, but without authority to bind the supposed principal. In these and all like cases, no additional validity is given to the instruments by putting them in the form of negotiable paper. (See *Veeder v. Town of Lima*, 19 Wis. 297 to 299, and authorities there cited. See also *Thomas v. Watkins*, 16 Wis. 549.)

And identical in principle, also, are those cases under the registry laws, where the *bona fide* purchaser for value of land has been held not to be protected when the recorded deed under which he purchased and claims, turns out to have been procured by fraud as to the signature, or purloined or stolen, or was a forgery, and the like. (See

*Everts v. Agnes*, 4 Wis. 343, and the remarks of this court, pp. 351-353, inclusive.)

In the case first above cited (*Foster v. McKinnon*), the defendant was induced to put his name on the back of a bill of exchange by the fraudulent representation of the acceptor, that he was signing a guaranty. In an action against him as indorser, at the suit of a *bona fide* holder for value; the Lord Chief Justice, Boville, directed the jury that, "If the defendant's signature to the document was obtained upon a fraudulent representation that it was a guaranty, and the defendant signed it without knowing that it was a bill, and under the belief that it was a guaranty, and if he was not guilty of any negligence in so signing the paper, he was entitled to the verdict;" and this direction was held proper. In delivering the judgment of the court upon a rule *nisi* for a new trial, Byles, J., said:

"The case presented by the defendant is, that he never made the contract declared on; that he never saw the face of the bill; that the purport of the contract was fraudulently misdescribed to him; that when he signed one thing, he was told and believed he was signing another and an entirely different thing; and that his mind never went with his act. It seems plain on principle and on authority, that if a blind man, or a man who cannot read, or for some reason (not implying negligence), forbears to read, has a written contract falsely read over to him, the reader misreading to such a degree that the written contract is of a nature altogether different from the contract pretended to be read from the paper, which the blind or illiterate man afterward signs, then, at least if there be no negligence, the signature so obtained is of no force; and it is invalid, not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signer did not accompany the signature; in other words, that he never intended to sign, and therefore, in contemplation of law, never did sign the contract to which his name is appended."

And again, after remarking the distinction between the case under consideration and those where a party has written his name upon a blank piece of paper, intending that it should afterwards be filled up, and it is improperly so filled, or for a larger sum, or where he has written his name upon the back or across the back or across the face of a blank bill stamp, as indorser or acceptor, and that has been fraudulently or improperly filled, or in short, where, under any circumstances, the party has voluntarily affixed his signature to commercial paper, *knowing what he was doing, and intending the same to be put in circulation as a negotiable security*, and after also showing that in all such cases the party so signing will be liable for the full amount of the note or bill, when it has once passed into the hands of an innocent indorsee or holder, for value before maturity, and that such is the limit of the protection afforded to such an indorsee or holder, the learned judge proceeded:—

“But, in the case now under consideration, the defendant, according to the evidence, if believed, and the finding of the jury, never intended to indorse a bill of exchange at all, but intended to sign a contract of an entirely different nature. It was not his design, and, if he were guilty of no negligence, it was not even his fault, that the instrument he signed turned out to be a bill of exchange. It was as if he had written his name on a sheet of paper for the purpose of franking a letter, or in a lady's album, or an order for admission to Temple Church, or on the fly-leaf of a book, and there had already been, without his knowledge, a bill of exchange or a promissory note payable to order inscribed on the other side of the paper. To make the case clearer, suppose the bill or note on the other side of the paper in each of these cases to be written at a time subsequent to the signature, then the fraudulent misapplication of that genuine signature to a different purpose would have been a counterfeit alteration of a writing with intent to defraud, and would therefore have amounted to a forgery. In that case the signer would not have been bound by his signature, for two reasons — first, that he never in fact signed the writing declared on, and, secondly, that he never intended to sign any such contract.”

“In the present case, the first reason does not apply, but the second does apply. The defendant never intended to sign that contract, or any such contract. He never intended to put his name to any instrument that then was or thereafter might become negotiable. He was deceived, not merely as to the legal effect, but as to the *actual contents* of the instrument.”

The other case first above cited (*Whitney v. Snyder*), was in all respects like the present, a suit upon a promissory note by the purchaser before maturity, for value, against the maker; and the facts offered to be proved in defense were the same as here; and it was held that the evidence should have been admitted.

In *Nance v. Larey* (5 Ala. 370), it was held that where one writes his name on a blank piece of paper, of which another takes possession *without authority therefor*, and writes a promissory note above the signature, which he negotiates to a third person, who is ignorant of the circumstances, the former is not liable as the maker of the note to the holder. In that case the note was written over the signature by one Langford, and by him negotiated to the plaintiff in the action, who sued the defendant as maker. Collier, C. J., said: —

“The making of the note by Langford was not a mere fraud upon the defendant; it was something more. It was quite as much a forgery as if he had found the blank, or purloined it from the defendant's possession. If a recovery were allowed upon such a state of facts, then every one who ever indulges in the idle habit of writing his name for mere pastime, or leaves sufficient space between a title and his subscription, might be made a bankrupt by having promises

to pay money written over his signature. Such a decision would be alarming to the community, has no warrant in law, and cannot receive our sanction."

And in *Putnam v. Sullivan* (4 Mass. 54), Chief Justice Parsons said:—

"The counsel for the defendants agree that, generally, an indorsement obtained by fraud will hold the indorsers according to the terms of it, but they make a distinction between the cases where the indorser, through fraudulent pretenses, has been induced to indorse the note he is called on to pay, and where he never intended to indorse a note of that description, but a different note and for a different purpose. Perhaps there may be cases in which this distinction ought to prevail. As, if a blind man had a note falsely and fraudulently read to him, and he indorsed it, supposing it to be the note read to him. But we are satisfied that an indorser cannot avail himself of this distinction, but in cases where he is not chargeable with any laches or neglect, or misplaced confidence in others." (See also 1 Parsons on Notes and Bills, 110 to 114, and cases cited in notes.)

The judgment below must be reversed, and a *venire de novo* awarded.<sup>7</sup>

By the Court.—It is so ordered.<sup>8</sup>

## § 94

### CHAPMAN v. ROSE.

56 NEW YORK, 137. — 1874.

THIS action was upon a promissory note of \$270, signed by defendant, payable to E. A. Miller or bearer.

Defendant entered into a contract with Miller to act as agent for the sale of a patent hay fork and pulley. A contract was filled out by Miller and signed by both; also an order, which was signed by defendant, for one of the hay forks and two pulleys, for which, by the order, defendant agreed to pay nine dollars. These were delivered to defendant. Another paper was then presented to defendant for his signature, which Miller represented to be but a duplicate of the order.

<sup>7</sup> Accord: *Gibbs v. Linabury*, 22 Mich. 479; *De Camp v. Hamma*, 29 Oh. St. 467; *Puffer v. Smith*, 57 Ill. 527; *Green v. Wilkie*, 98 Iowa, 74. — H.

[To the same effect, see *Home Nat. Bank v. Hill*, 165 Ind. 226, and *Yakima Valley Bank v. McAllister*, 37 Wash. 566. In a note to the latter case in 1 L. N. S. 1075, it is said: "There are a few cases, however, which hold that, if the signature was actually affixed by the maker with the intention of signing some kind of a paper, the mere fact that he was defrauded as to what he was actually signing would be no defense to a note in the hands of a *bona fide* holder. *First Nat. Bank v. Johns*, 22 W. Va. 520, 46 Am. Rep. 506; *Phelan v. Moss*, 67 Pa. 59, 5 Am. Rep. 402; *Battles v. Laudenslager*, 84 Pa. 446; *Loomis v. Metcalf*, 30 Iowa, 382." — C.]

<sup>8</sup> The principle of this decision has been codified in section 1676-25 of the Wisconsin Negotiable Instruments Law. See note 4, *ante*, p. 386. — C.

Defendant without reading or examining it, signed it and delivered it to Miller; the paper so signed was the note in suit. Plaintiff purchased in good faith before maturity, paying therefor \$245.

The court charged the jury: "If you find that this paper was never delivered as a note, plaintiff fails in his action; if you find that it was delivered but this plaintiff failed or neglected to make the proper inquiry, then he is not entitled to recover for he fails as a *bona fide* holder."

Plaintiff excepted generally to the whole of the charge.

Plaintiff requested the court to charge:—

*First.* That if the signature upon the note is the genuine handwriting of defendant, circumstances of fraud in its inception constitute no defense to the note in the hands of an innocent purchaser.

The court refused to so charge.

*Second.* That if the plaintiff purchased said note in good faith and for a valuable consideration, the plaintiff is entitled to judgment for the full amount thereof.

*Third.* That if defendant negligently and without sufficient care and precaution put his name to the paper and delivered it to Miller, he is liable for its amount as a promissory note.

*Fourth.* That there are no circumstances in this case indicating a fraud in the inception, and which were calculated to put the plaintiff on his guard, and therefore he is a purchaser in good faith.

The court declined to charge either of these propositions.

Verdict and judgment for plaintiff (defendant?)

JOHNSON, J.—The judge charged the jury that if the paper sued upon was never delivered as a note, the plaintiff must fail in the action; and that even if it was delivered, and the plaintiff neglected to make proper inquiry as to its origin, he was not a *bona fide* holder and could not recover. The exception to the charge was general, but if both propositions were erroneous the error can be reached and corrected; especially as the attention of the judge appears to have been called, by requests to charge, to the precise grounds on which the charge is now claimed to be erroneous.

The latter branch of the charge presents the question of notice to put a party on inquiry, as affecting his right to be regarded as a *bona fide* holder. It is now, however, the settled law that mere negligence, however gross, is not sufficient to deprive a party of the character of a *bona fide* holder. There must be proof of bad faith. That alone will deprive him of that character. (*Welch v. Sage*, 47 N. Y. 143; *Seybel v. National Currency Bank*, Commission of Appeals, 54 N. Y. 288; *Murray v. Lardner*, 2 Wall. 110; *Goodman v. Simonds*, 20 How. 452.) This part of the charge, therefore, cannot be sustained. If, then, the appellant can maintain the position that the other branch of the charge is also erroneous, he will be entitled to the reversal of the judgment, notwithstanding the generality of the exception.

The evidence tended very strongly to show that the signature of the defendant to the note sued upon, was obtained from him through a very gross and fraudulent representation perpetrated upon him by one Miller. That when he signed it, he supposed he was signing a paper of a very different character, and not an engagement to pay money absolutely. He had, just before, signed an order for the delivery to himself of a hay fork and two grappling pulleys, amounting together in price to nine dollars, for which he engaged to pay; and this paper now in suit was presented to him as a duplicate of that order, and was signed as such without examination or reading it, upon the statement of Miller, with whom he was dealing, that such was its character. There does not appear to have been any physical obstacle to the defendant's reading the paper before he signed it. He understood that he was signing a paper by which he was about to incur an obligation of some sort, and he abstained from reading it. He had the power to know with certainty the exact obligation he was assuming, and chose to trust the integrity of the person with whom he was dealing, instead of exercising his own power to protect himself. It turns out that he signed a promissory note, and that it is now in the hands of a holder in good faith, for value. The question which arises on the branch of the charge now under consideration is, whether it is enough, as against a *bona fide* holder, to show that he did not know or suppose that he was signing a note, unless it also appears that he was guilty of no laches or negligence in signing the instrument. To that inquiry the attention of the judge, at the trial, was distinctly called; and the instruction which he gave and which was excepted to, did not submit, but excluded the consideration of it from the jury. It is quite plain that if the law is that no such inquiry is admissible, a serious blow will have fallen upon the negotiability of paper. It will be a premium offered to negligence. To insure irresponsibility only the utmost carelessness, coupled with a little friendly fraud, will be essential. Paper in abundance will be found afloat, the makers of which will have had no idea they were signing notes, and will have trusted readily to the assurance of whoever procured it that it created no obligation. To avoid such evils it is necessary, at least, to hold firmly to the doctrine that he who, by his carelessness or undue confidence, has enabled another to obtain the money of an innocent person, shall answer the loss. If it be objected that there must be a duty of care, in order to found an allegation of negligence upon the neglect of it, it must be answered that every man is bound to know that he may be deceived in respect to the contents of a paper which he signs without reading. When he signs an obligation without ascertaining its character and extent, which he has the means to do, upon the representation of another, he puts confidence in that person; and if injury ensues to an innocent third person by reason of that confidence, his act is the means of the injury, and he ought to answer to it.



[After discussing *Foster v. MacKinnon*, L. R. 4 C. P. 704; *Whitney v. Snyder*, 2 Lans. 477; *Putnam v. Sullivan*, 3 Mass. 45, and *Douglas v. Matting*, 29 Iowa, 498, the court continues:]

In all these cases, the real ground of decision is not that the party meant to make a promissory note, but that meaning to make an obligation in writing, and which was put in writing that it might of itself import both the fact and the form and the measure of the obligation, he trusted another to fix that form and measure, without exercising that supervision which was in his power and by which perfect protection was possible. In such cases, the rule is, that he is bound by the act of him who has been trusted in favor of a holder in good faith.

The judgment must be reversed and a new trial granted, costs to abide the event.

All concur. Judgment reversed.\*

## § 94

## LEWIS v. CLAY.

42 SOLICITORS' JOURNAL (JAN. 1, 1898) 151, 67 L. J. Q. B. 224.

ACTION by payee against defendant as one of two makers of two joint and several promissory notes, for £3,113, 15s., and £8,000, respectively. It is admitted that defendant's signatures are genuine and that his signatures to two letters authorizing plaintiff to pay the proceeds to Lord William Nevill, the other maker, are also genuine. Plaintiff gave value in good faith for the notes. Defendant's signatures to the notes and letters were procured by Lord William Nevill in this wise: The latter came to defendant and asked him to witness some documents, producing a roll of papers covered by blotting or other paper in which there were four openings; defendant asked what the documents were and was answered that they concerned private family matters, that defendant could see them if he insisted, but it was preferred that he should not; defendant did not insist and

\* "The law of the state is, that where a party is induced to sign a negotiable instrument by reason of fraud, artifice or deception practiced upon him by another as to the nature of the instrument, and the maker signs the same innocently and under the belief that it was a contract of a different character, then there can be no recovery upon the note, although the holder may be an innocent purchaser for value before maturity, unless the maker was guilty of laches or carelessness in omitting to read the same, or by some other means ascertaining the true nature and import of the instrument. (*National Ex. Bk. v. Veneman*, 43 Hun, 241, cited with approval in *Page v. Krekey*, 137 N. Y. 313)." — *Hutkoff v. Mojc.* 20 Misc. (N. Y.) 632 (1897). Negligence on the part of the one signing renders him liable to a holder in due course. *Shirts v. Overjohn*, 60 Mo. 305; *Citizens' Nat. Bank v. Smith*, 55 N. H. 593; *Kellogg v. Curtis*, 65 Me. 59; *Nebeker v. Cutsinger*, 48 Ind. 436; *Ort v. Fowler*, 31 Kans. 478. — H.

signed his name four times through the openings. Lord William Nevill also signed, and defendant believed he was signing as witness to the former's signatures. Defendant had just come of age, had known Lord William Nevill intimately for some years, and had no reason to doubt his honor.

The following questions were put to the jury, who gave the answer appended to each:— (1) Did the plaintiff take the promissory notes in good faith? [It is admitted he took them for value.] Answer.— Yes. (2) Is the defendant's account of the circumstances under which he signed his name substantially true? Answer.— Yes. (3) Was the defendant, in signing his name as he did, recklessly careless, and did he thereby enable Lord William Nevill to perpetrate the fraud? Answer.— No; not under the circumstances. (4) Were the signatures to the documents given by the defendant in misplaced confidence in the statements of Lord William Nevill as to their nature? Answer.— Yes. (5) Did the defendant sign his name to be used by Lord William Nevill for any purpose he chose? Answer.— No. (6) Did the defendant attach his signature to the documents without due care? Answer.— No; not under the circumstances.

On these findings the case was reserved by the Lord Chief Justice for further consideration.

LORD RUSSELL OF KILLOWEN, C. J.— I have now to consider in the light of these findings which of the parties is entitled to judgment. It is clear that the proof of the signature of the defendant to the promissory notes, coupled with proof of their delivery to the plaintiff under the apparent authority of the defendant, makes out a *prima facie* case for the plaintiff. Is it a conclusive case? Here two questions arise— (1) Is the defendant precluded or estopped from setting up the true circumstances under which his name came to appear on the documents in question? (2) If not, do those true circumstances afford an answer in point of law to the plaintiff's claim?

I. As to the first question the defendant is not, in my judgment, estopped or precluded from setting up the actual facts upon any principle of law. Apart from statute such preclusion or estoppel can only arise (in circumstances like the present) where the defendant had so conducted himself that it would be contrary to natural justice to permit him to assume a position inconsistent with that which he had ostensibly occupied, or which he led others to believe he occupied, and upon which others had, misled by his conduct, been suffered to act. In the present case the suggestion on the part of the plaintiff is that the defendant had not used due care in signing his name, and that he had signed in misplaced confidence in Lord William Nevill. The jury have found that there was, in fact, no want of due care in the circumstances in signing his name as he did; but it was urged that the finding as to misplaced confidence was sufficient, and the authority of a distinguished American judge in the

case of *Putnam v. Sullivan* (4 Mass. 45) was cited. What does misplaced confidence mean? It may mean confidence placed where you know or ought to know it is not safe, or confidence placed where you have every right to believe it is safe, but where it is afterwards betrayed. The former, I think, is the case the learned judge had in his mind, and the facts there may afford evidence of want of due care; but that clearly is not here the meaning attributed by the jury to misplaced confidence, for they have found that there was in the circumstances no want of due care on the part of the defendant. Taking the findings together they amount to this — that the defendant was in the circumstances guilty of no want of due care in placing confidence in the statement made by Lord William Nevill, and accordingly in signing his name as he did; and I decline to hold that the placing of confidence as here shown, which is afterwards betrayed, where it is not recklessly or negligently so placed, in any way precludes the defendant from setting up the true facts as a defense. I conclude, therefore, the defendant is not, upon any principle of law, estopped or precluded from setting up the true facts.

How, then, is the plaintiff's case put? It was argued that whatever was the law before or apart from the Bills of Exchange Act, 1882 the facts here did not under that Act afford a defense as against a "holder in due course," which, it was said, the plaintiff was within section 29, and that the question must be determined by reference to that Act alone. I think this argument involves a misconception both of the plaintiff's position and of the scope and effect of the Act of 1882. It will be apparent from a consideration of the facts of the case that the plaintiff was not a "holder in due course" at all, but that he was, in fact, simply the named payee of two promissory notes. Further, an examination of sections 20, 21, 29, 30, and 38, relating expressly to bills, and sections 83, 84, 88, and 89, relating to promissory notes, will make it quite clear that "a holder in due course" is a person to whom, after its completion by and as between the immediate parties, the bill or note has been negotiated. In the present case the plaintiff is named as payee on the face of the promissory note, and therefore is one of the immediate parties. The promissory notes have, in fact, never been negotiated within the meaning of the act.<sup>1</sup>

I desire to say here that, even if the plaintiff were "holder in due course," it would, in my judgment, make no difference in the result.

But is the contention right that the Act of 1882 must alone be looked to? I think not. That act was intended to be mainly a codi-

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<sup>1</sup> On the point discussed in this paragraph, see *Boston Steel & Iron Co. v. Steuer*, 183 Mass. 140, *ante*, p. 174; *Vander Ploeg v. Van Zuuk*, 135 Iowa, 350, *ante*, p. 179; *Lloyd's Bank, Limited, v. Cooke*, [1907] 1 K. B. 794, *ante*, p. 185. — C.

fication of the existing law, but it is not merely a codification act, for some alterations of the law are clearly effected by it and it does not purport to be exhaustive, for, by section 97, the rules of the Common Law (including the Law Merchant), save in so far as they are inconsistent with the express provisions of the act, continue to apply. But I agree that in determining questions of liability on bills or notes it is proper to examine the act before turning to the cases declaratory of the Common Law decided before that act.

It is unnecessary to set out the provisions of the act and to comment in detail upon them. It is enough to say that there is nothing in the act which prevents the defendant from setting up the defense that he never made the promissory notes in question — which is the real defense here. It would, indeed, be strange if it did. For the purposes of the present case the question is precisely the same as if any other contract than one by promissory note had been written on the documents to which the defendant was induced to sign his name — for instance, if it had been a contract of guarantee or suretyship. Then the question would have been — Did the defendant make the contract of guarantee or suretyship? Here it is — Did he make the promissory notes sued upon?

II. The question, then, is, on the facts as they are now found to be — Did the defendant make the promissory notes in question? If he did not, then the finding of the jury that the defendant was not guilty of any want of due care establishes that he is not precluded from saying so. That there is a *prima facie* case on the plaintiff's evidence that he did, I have already said; but is that *prima facie* case rebutted and displaced by the defendant's evidence? According to that evidence it must, after the findings of the jury, be taken to be the fact that he was witnessing a deed or document; that he was so told; that he had no idea of signing, and was not asked to sign, any bill or promissory note, or to undertake any contractual obligation of any kind. A promissory note is a contract by the maker to pay the payee. Can it be said that in this case the defendant contracted to pay the plaintiff? His mind never went with such a transaction; for all that appears, he had never heard of the plaintiff, and his mind was fraudulently directed into a different channel by the statement that he was merely witnessing a deed or other document. He had no contracting mind, and his signature obtained, by untrue statements fraudulently made, to a document of the existence of which he had no knowledge, cannot bind him. It is 'as if he had written his name for an autograph collector, or in an album. The case differs in no material respect from one in which a genuine signature is deftly transferred by delicate contrivance from one document to another, and so skillfully as to escape notice under ordinary examination. Or, again, if the body of the promissory notes had been fraudulently written above, and after his signature had been

made, it would have been forgery, and in such case it is clear no recourse could be had upon it. Can it make any difference as to resulting contractual obligation that the body of the note was, without his knowledge, filled up before he was fraudulently induced to put his name in the belief that it was something wholly different? I think not. In plain reason it must be said that the use to which the defendant's signature was applied was in substance and effect forgery, whether or not it amounted to the criminal offense of forgery.

I think it well to point out that cases like the present differ widely from those in which the party sought to be charged has agreed and intended to enter into contractual obligation by bill or note, but has been defrauded into agreeing, or been defrauded in the manner in which the bill or note has been dealt with. In such cases he is liable on principle and authority, to any one who has dealt with the bill or note in good faith and for value.

It was in argument admitted that the case of *Foster v. Mackinnon* (17 W. R. 1105, 4 L. R. C. P. 704), is in point, and is an authority binding on me if the Bills of Exchange Act of 1882 has not altered the law as there declared. I find that the law has not been so altered. I see nothing in the act to warrant the suggestion that it has been altered, and it is noteworthy that all the text-writers dealing with the Bills of Exchange Act, 1882 (including, indeed, the draftsman of the act), treat that case as an existing authority. The facts in *Foster v. Mackinnon* were, that an old man of feeble sight was induced — without, as the jury found, any negligence on his part — to sign his name on the back of a bill by the fraudulent statement that it was a guarantee which, in fact, he had undertaken to sign. The Court of Common Pleas (consisting of Bovill, C. J., and Byles, Keating, and Montagu Smith, JJ.), held that he was not liable, and this in an action by what was then called a *bona fide* holder for value and without notice, of which “holder in due course” is now the legal equivalent.

In these islands, cases in litigation of frauds such as that here practiced are of rare occurrence, partly because of the existence and character of our stamp laws, but in the United States of America, where no such laws exist, there are many authorities dealing with points similar to that in the present case. (*Douglas v. Matting*, 4 Am. Rep. 238 [29 Iowa, 498]; *Taylor v. Atchison*, 5 Am. Rep. 118 [54 Ill. 196]; *Whitney v. Snyder*, 2 Lans. 477; *Walker v. Ebert*, 9 Am. Rep. 548 [29 Wis. 194]; *Griffiths v. Kellogg*, 20 Am. Rep. 48 [39 Wis. 290]). The great weight of United States authorities supports the view of the common law expressed by the English judges.

I have thought it right to say so much, but in truth these authorities are not necessary for the purposes of this case. They are all cases where the bills or notes had been negotiated to persons now

called "holders in due course." It follows, if such a holder cannot in a case like the present recover, *a fortiori* that the plaintiff — who, as named payee, is one of the immediate parties — cannot recover.

In the result, therefore, my judgment must be for the defendant, and the plaintiff must be enjoined from in any way dealing with the notes, and the same must be canceled so far as they purport to be the notes of the defendant.

## ARTICLE VI.

### LIABILITY OF PARTIES.

#### I. Maker: absolute, primary liability; admissions.

##### 1. PRESENTMENT FOR PAYMENT UNNECESSARY.

See Neg. Inst. Law, § 130, *post*, pp. 477-480.

##### 2. LIABILITY ON LOST OR DESTROYED INSTRUMENT.

§ 110

MCGREGORY *v.* MCGREGORY.

107 MASSACHUSETTS, 543. — 1871.

ACTION against makers on notes alleged to be lost. Verdict for plaintiff, who filed a bond for protection of defendants from liability on lost notes, to the approval of the judge.

GRAY, J.<sup>1</sup>—Destruction by fire is one mode by which property may be lost, and an allegation that a note has been lost is fully supported by proof that it has been destroyed by fire.

It is well settled in this commonwealth, that an action at law may be maintained on a lost promissory note, whenever a bond of indemnity will afford complete protection to the defendant; and that such an action may be maintained against the maker of such a note, upon filing a sufficient bond of indemnity. All the makers of the notes described in these three counts are defendants in this action; and they do not stand like an indorser of a promissory note, who is entitled, upon taking it up to the possession thereof, in order that he may have his recourse over against the maker, or negotiate it again; or like the acceptor of a bill of exchange, who may need it as a voucher in settling his account with the drawer. (*Fales v. Russell*, 16 Pick. 315; *Almy v. Reed*, 10 Cush. 421; *Boston Lead Co. v. McGuirk*, 15 Gray, 87; *Tower v. Appleton Bank*, 3 Allen, 387; *Tuttle v. Standish*, 4 Allen, 481; *Savannah National Bank v. Haskins*,<sup>2</sup> 101 Mass. 370.)

Judgment on the verdict for the plaintiff.<sup>3</sup>

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<sup>1</sup> Omitting other questions. — H.

<sup>2</sup> Holds acceptor of lost bill liable only in equity. Accord: *Pierson v. Hutchinson*, 2 Camp. 211. — H.

<sup>3</sup> If a note or bill is shown actually to have been destroyed, most courts allow an action at law. *Des Arts v. Leggett*, 16 N. Y. 582; *Dean v. Speakman*, 7 Blatchf. (Ind.) 317. But not if it is voluntarily destroyed by the holder. *Blade v. Noland*, 12 Wend. (N. Y.) 173. Some courts make a distinction between instruments lost before maturity and those lost after maturity, allowing an action at law on the latter. *Thayer v. King*, 15 Ohio, 242; *Mowery v.*

## 3. ADMISSION OF EXISTENCE AND CAPACITY OF PAYEE.

§ 110

McMANN v. WALKER.

31 COLORADO, 261. — 1903.

THE defendant in error executed and delivered his promissory note, in the city of Denver, payable to the Sprague Collection Agency. The payee was a foreign corporation, and at the time of this transaction had not, nor has it since, complied with the law requiring such corporations to pay certain fees before engaging in business in this state. (Sess. Laws, 1897, p. 157, c. 51.) Before maturity, the plaintiffs in error, for value, and without notice that the payee had not complied with the law relative to foreign corporations, purchased the note from the payee in the city of Denver. In an action by the purchasers against the maker to enforce its collection, the trial court held that the note was void, and rendered judgment for the defendant. The plaintiffs bring the case here for review on error.

GARBERT, J. [after stating the facts.] — The only question necessary to determine is whether or not a negotiable promissory note in the hands of parties obtaining it for value, in good faith, before maturity, from a foreign corporation in this state, to which it was given in this state, is invalid as against the maker because such corporation, at the time of the execution and delivery of such note or subsequently, had not complied with the laws relative to the conditions which would authorize it to engage in business within the state. The question is one which has been discussed by the courts of several states, with the result that the decisions on the subject are not altogether harmonious. Whether or not the note in question be invalid as between the maker and payee is a question upon which we express no opinion, because that proposition is not involved, and does not in any manner affect the rights of the parties to this action. The statute which the maker invokes does not provide that a note given a foreign corporation in the circumstances narrated shall be invalid in the hands of third parties, and it should not be given a construction, unless unavoidable, which would result in visiting upon innocent third parties a penalty for its violation by another. In this state the general rule of law prevails that negotiable commercial paper, although invalid as between the immediate parties, is valid as to third persons obtaining it for value before maturity, and without notice of its infirmities, unless so declared by statute. (*Boughner v. Meyer*,

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*Mast*, 14 Neb. 510. But other courts deny the validity of this distinction. *Moses v. Trice*, 21 Gratt. (Va.) 556. See in general on lost or destroyed bills and notes, 2 Daniel on Neg. Inst., §§ 1475-1485.

The matter is governed by statute in New York. Code Civ. Proc. § 1917.—H



5 Colo. 71.) See, also, *Sondheim v. Gilbert*, 117 Ind. 71, where the subject is quite fully discussed and many authorities cited.<sup>4</sup>

The defendant, by giving a note which is not the subject of statutory enactment, thereby conclusively admitted as to third parties purchasing before maturity, and in good faith, the legal existence of the payee, and its authority to take such note, and to negotiate and transfer it by indorsement. Section 60,<sup>5</sup> Negotiable Instruments Act (Sess. Laws 1897, p. 223, c. 64); 4 Enc. Law (2d Ed.) 474, 475; *Wolke v. Kuhne*, 109 Ind. 313; 1 Edwards' Bills and Notes (3d Ed.) § 363; Bigelow on Estoppel (4th Ed.) 512.

The plaintiffs were in no manner connected with the original transaction, and they violated no law in purchasing the note from the payee. They purchased it in good faith, before maturity; it was negotiable in form; and the maker cannot be heard to say, as against them, in these circumstances, in the absence of a statute to the contrary, that the payee committed an illegal act in taking, or had no authority to dispose of, it, in the usual course of business, because by its execution and delivery he is precluded from raising any of these questions as against the purchasers, who obtained it for value, before maturity, without notice of the fact upon which he relies to defeat it. The courts cannot undertake to render the statute relied upon by defendant effective by imposing penalties which it has not provided, or placing them where they do not belong. If defective because no sufficient provision is made for its enforcement, that is a matter for the Legislature to remedy. According to the undisputed facts, the plaintiffs were entitled to a recovery on the note. The judgment of the County Court is therefore reversed, and the cause remanded, with directions to render judgment in favor of the plaintiffs.

Judgment reversed.<sup>6</sup>

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<sup>4</sup> See also *Alexander v. Hazelrigg*, 123 Ky. 677, *ante*, p. 375, and *Arnd v. Sjoblom*, 131 Wis. 642, *ante*, p. 383. — C.

<sup>5</sup> N. Y., § 110. — C.

<sup>6</sup> Maker of a note payable to the order of "A. B. Attorney-General" cannot dispute his right to transfer it. *Wolke v. Kuhne*, 109 Ind. 313. Maker of a note payable at "A. B." cannot deny the existence of such a place when the statute requires negotiable instruments to be payable at a place certain. *Brown v. First N. B.*, 103 Ala. 123. *Contra*, where the statute requires it to be payable at a bank. *Parkinson v. Finch*, 45 Ind. 122. — H.

[In *Castor v. Peterson*, 2 Wash. 204, it was held that the maker of a promissory note payable to the order of a married woman guarantees her capacity to indorse and transfer the same; and the fact that the note is community property will not affect the title of a *bona fide* indorsee for value before maturity, where he has no notice that the note is community property. Hoyt, J., said: "The maker promised to pay Mrs. Eliza E. Pool, or order, and in making the note so payable he guaranteed, to every person taking such note in good faith, her ability to order the same paid to another — that is, to indorse it — and as to every such person buying in good faith and for value such guaranty was conclusive. That the maker of negotiable paper thus guar-

## § 110

FRAZIER *v.* MASSEY.

[Reported herein at p. 220.] †

**II. Acceptor: absolute, primary liability; admissions.**

## 1. PRESENTMENT FOR PAYMENT UNNECESSARY.

See Neg. Inst. Law, § 130; *post*, pp. 477-480.

## 2. ADMISSIONS AS TO DRAWER AND PAYEE.

§ 112 FIRST NATIONAL BANK OF LISBON *v.* BANK OF WYNDMERE.

15 NORTH DAKOTA, 299. — 1906.

ACTION by the First National Bank of Lisbon against the Bank of Wyndmere. Judgment for defendant, and plaintiff appeals.

INGERUD, J. This is an appeal from an order sustaining a demurrer to the complaint on the ground that it does not state a cause of action. The complaint states the following facts: The plaintiff and defendant are banking corporations, located, respectively, at Lisbon and Wyndmere, in this state. On July 1, 1905, the defendant caused to be presented to plaintiff for payment a forged check purporting to have been drawn by Bixby & Marsh upon the plaintiff bank in favor of Theodore Larson for \$60.25, dated June 27, 1905, and indorsed in blank by the payee. It also bore the indorsement of the defendant, and each of the several banks through whose hands it had passed in the usual course of transmission from defendant to plaintiff. Each indorsing bank had expressly guaranteed the genuineness of previous indorsements. Bixby & Marsh were depositors in plaintiff bank, and had to their credit subject to check a sufficient amount to pay the check in question. The plaintiff bank believing the check genuine, paid it and charged it to the account of Bixby & Marsh. The name of this firm had been forged, but this fact was

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antees the capacity of the payee to indorse and transfer the same seems to arise from the necessity of the case, and the rule is therefore founded upon reason. It is likewise abundantly supported by authority. See Daniel, Neg. Inst., § 93, and cases there cited. This rule has been frequently applied to notes made to and transferred by infants. See section 227 of the authority above cited. Likewise to married women under the disabilities of the common law." P. 207. — C.]

† In like manner the drawer (*Grey v. Cooper*, 3 Doug. 65, *post*, p. 418), and acceptor (*Taylor v. Croker*, 4 Esp. 187; *Smith v. Marsack*, 6 C. B. 486), admit the existence of the payee and his then capacity to contract. See two following sections of Neg. Inst. Law. — H.

not discovered until July 20th, when Bixby & Marsh, who were ranchmen living more than 20 miles from Lisbon, called at the bank and examined the canceled vouchers. Bixby & Marsh declined to allow credit to plaintiff for the spurious voucher. Immediately on that day, the plaintiff notified the defendant bank of the forgery, and demanded repayment; at the same time returning the forged check to defendant. The defendant refused to refund. Judgment is demanded for the amount of the check and interest.

The question presented by this case is one that has never heretofore come before this court. It will be noticed that the complaint does not charge the defendant with any bad faith or neglect of duty in indorsing and putting in circulation the forged check, and we must therefore assume that the defendant indorsed, and caused the check to be presented for payment in good faith in the mistaken belief that it was genuine. The plaintiff upon whom the check was drawn, accepted and paid the check under the same mistaken belief that the drawer's signature was genuine. If we had not read the numerous cases which have been cited dealing with this question, we would have thought the proposition was a very plain one, readily solved by the application of fundamental principles of law and common sense. The defendant had received from the plaintiff without consideration a sum of money which it was not rightfully entitled to, and the sole moving clause which induced the exchange of money for the spurious check was the mutual mistake of the parties to the transaction with respect to the genuineness of the writing. In the absence of any showing that the defendant had been misled or prejudiced by the plaintiff's mistake so as to render it inequitable to compel repayment, the defendant ought to refund the money had and received. Unfortunately, however, this just and simple solution of what seems to us a plain proposition, has not generally prevailed. A number of courts have laid down the unqualified rule that where the drawee of a check to which the name of the drawer has been forged, pays it to a *bona fide* holder, he is bound by the act, and cannot recover the payment. *National Park Bank v. Ninth National Bank*, 46 N. Y. 77.<sup>8</sup>

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<sup>8</sup> [This case was reported herein in the first edition of this work with the following note:]

In the case of a bill payable to drawer's order the acceptor admits the capacity of the drawer to draw and to indorse; he admits the genuineness of the signature as drawer, but it seems not the genuineness of the signature as indorser. *Braithwaite v. Gardiner*, 8 Q. B. 473; *Smith v. Marsack*, 6 C. B. 486, 18 L. J. C. P. 65; *Halifax v. Lyle*, 3 Exch. 446; *Beeman v. Duck*, 11 M. & W. 251; *Garland v. Jacomb*, L. R. 8 Exch. 216. See Bills of Exchange Act, § 54, subsec. 2(b). In like manner he admits the authority of an agent to draw, but not his authority to indorse. *Robinson v. Yarrow*, 7 Taunt. 455.

The acceptor does not admit the genuineness of the body of the bill. Hence if it has been raised he is not bound on his acceptance, and if he has paid a

The reason generally assigned to justify the adoption of this rule is stated in *Germania Bank v. Boutell*, 60 Minn. 189, as follows: "The money of the commercial world is no longer coin. The exchanges of commerce are now made almost entirely by means of drafts and checks. It was largely in deference to this fact that the recovery of money paid on paper of this kind to which the drawer's signature was forged, was made an exception to the general rule as to the recovery of money paid under a mistake of fact. In view of the use of this class of paper as money, it was considered that public policy required that as between the drawee and good-faith holders, the drawee bank should be deemed the place of final settlement, where all prior mistakes and forgeries should be corrected and settled once for all, and if not then corrected, payment should be treated as final; that there must be a fixed and definite time and place to adjust and end these things as to innocent holders; and that time and place should be the paying bank and the date of payment and that if not done then, the failure to do so must be deemed the constructive fault of the payee bank, which must take the consequences." According to this line of cases the whole duty and risk of determining the genuineness of a draft or check rests upon the drawee, and as Lord Mansfield is reported to have said in *Price v. Neal*, 3 Burr. 1354, the holder "need not inquire into it," provided he acquired the paper for value in good faith. *Bank of St. Albans v. Farmers' & Mechanics' Bank*, 10 Vt. 141; *Neal v. Coburn*, 92 Me. 139; *Deposit Bank v. Fayette National Bank*, 90 Ky. 10; *Bernheimer v. Marshall*, 2 Minn. 78 (Gil. 61). Of this extreme view it is well said in 2 Morse on Banking (4th Ed.) § 464: "This doctrine is fast fading into the

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raised bill or check, he may recover the money. *Marine N. B. v. Nat. City Bk.*, 59 N. Y. 67; *White v. Continental Bk.*, 64 N. Y. 316; *Redington v. Woods*, 45 Cal. 406. But see *Ward v. Allen*, 2 Met. (Mass.) 53. He is not under a duty to take precautions against subsequent fraudulent alterations; it is the drawer who has control over its form. *Scholfield v. Londesborough*, 1896, A. C. 514. — H.

<sup>9</sup> In another part of this case MITCHELL, J., said: "From what examination we have been able to make of the authorities, we have arrived at the conclusion that there are very few well-considered cases which go further than to hold that the bank may recover back money paid on a check to which the signature of one of its customers was forged, when there was a lack of good faith on the part of the payee towards the bank, as when he knew the check was forged, or knew of circumstances casting suspicion on its genuineness not known to the bank, and which he did not communicate to it, or where the holder was negligent in not making due inquiry as to the validity of the check before he took it, and the drawee, having a right to presume that he had made such inquiry, was itself thereby excused from making inquiry before paying it. In the first case the holder is really a party to the fraud, and is not a good faith holder. In the second case, he has, by his negligence, contributed to the consummation of the mistake on the part of the drawee by misleading him." 60 Minn., at p. 194. — C.

misty past, where it belongs. It is almost dead, the funeral notices are ready, and no tears will be shed, for it is founded in misconception of the fundamental principles of law and common sense."

Most of the courts now agree that one who purchases a check or draft is bound to satisfy himself that the paper is genuine; and that by indorsing it or presenting it for payment or putting it into circulation before presentation he impliedly asserts that he has performed this duty. Consequently it is held that if it appears that he has neglected this duty, the drawee, who has, without actual negligence on his part, paid the forged demand, may recover the money paid from such negligent purchaser. The recovery is permitted in such cases, because, although the drawee was constructively negligent in failing to detect the forgery, yet if the purchaser had performed his duty, the forgery would, in all probability, have been detected and the fraud defeated. *Gloucester Bank v. Salem Bank*, 17 Mass. 33; *Bank of U. S. v. Bank of Georgia*, 10 Wheat. 333; *National Bank of America v. Bangs*, 106 Mass. 441; *First National Bank of Danvers v. First National Bank of Salem*, 151 Mass. 280; *First National Bank v. Ricker*, 71 Ill. 439; *Rouvant v. Bank*, 63 Tex. 610; *Bank v. Bank*, 30 Md. 11; *People's Bank v. Franklyn Bank*, 88 Tenn. 299; *Ellis & Morton v. Trust Co.*, 4 Ohio St. 628; *Bank v. Bank*, 58 Ohio St. 207; *Bank v. Bank*, 22 Neb. 769; *Canadian Bank v. Bingham*, 30 Wash. 484. While all these authorities agree that negligence on the part of the purchaser in taking a forged check subjects him to liability for the loss, they are not in accord as to what constitutes such negligence. These authorities, it seems to us, have had the effect of substituting uncertainty and confusion for a rule which, although manifestly arbitrary and unjust, had at least the merit of simplicity and clearness. It must be conceded that the majority of the courts that have passed on the question are committed to the doctrine that the drawee who has paid a spurious check can recover the payment from a good-faith holder only when the latter has been negligent. If the law of this state is to be determined by the mere weight of authority alone, as evidenced by the decisions in other states, then we should be constrained to hold that this complaint shows no liability on defendant's part, because it does not show that the defendant has been in any degree negligent.

However valuable the decisions of courts in other jurisdictions may be as guides to aid us in coming to a correct decision, it cannot be admitted that such decisions, however numerous and uniform, conclusively establish the law for this jurisdiction. They are, after all, only arguments in support of the views entertained by the judges who uttered them. Unless the doctrines advocated by them have become part of the law of this state by the adoption of them by positive law or general usage and opinion, they must be received and considered by us merely as arguments to be weighed, and adopted or rejected

according as we deem them sound or unsound. If, in our opinion, a doctrine advocated by the courts of other states is an unwarranted departure from the fundamental principles of law, it is our duty to reject it, unless the rule so advocated, even though fundamentally erroneous, has become part of our common law by general usage and custom; or has been expressly or impliedly made part of our law by statute. There has been no statutory adoption of such a rule, and we have no hesitation in saying that there is no general usage or custom prevailing in this state that the checks and drafts of individuals shall circulate, and be treated and dealt with as bank or government currency. Yet, as indicated by the language quoted from the Minnesota decision (*Germania Bank v. Boutell, supra*), the rule that the drawee must, save in exceptional cases, bear the consequences of his mistake in honoring a spurious check, was adopted in deference to such a supposed usage. The fact that the cases advocating this doctrine all cite as authority *Bank of U. S. v. Bank of Georgia*, 10 Wheat. 333, and *Gloucester Bank v. Salem Bank*, 17 Mass. 33, which involve forged bank notes, shows that the rule rests on the assumption that the checks and drafts of individuals are to be placed in the same class with bank bills which are issued and intended to circulate as money. There is no statute or business usage in this state to warrant that assumption. The decisions which advocate the rule that a drawee may recover in case of negligence on the part of the holder who presents and receives payment of a spurious check, all recognize the fallacy of those decisions which apply the same rule to checks and drafts as is applicable to bank notes which circulate as money. Yet, strange to say, nearly all of them expressly or impliedly accept as true the proposition that a drawee of a check or draft should be excepted from the operation of that fundamental rule which permits one who parts with money by mistake to recover it from one who in equity and good conscience ought not to retain it. They simply hold that this exception should not apply in cases where the purchaser or indorsee was negligent in not taking proper precautions to guard against forgery. It is evident at a glance that this proposition, which these cases thus accept as proper, has no other foundation than the same premise which they very properly hold to be fallacious — namely, that checks and drafts on banks or individuals should be governed by the same rules as apply to bank notes which circulate as money. If it is conducive to the best interests of the business world to put checks and drafts on the same footing as bank currency, and if it would tend to make checks and drafts a more safe and convenient circulating medium of exchange, to shift the whole risk of loss by forgery upon the drawee instead of letting it rest upon those who are credulous enough to assume the risks of parting with value for such paper, the legislative branch of the government can be trusted to establish that rule, if such a radical departure from fundamental principles of law is deemed wise. The court has no power to do so.

Being convinced, as we are, that this doctrine advocated by the great majority of the cases which have come to our attention, to the effect that a drawee of a check should be excepted from the ordinary rules relating to the right to recover money paid by mistake, is unsound and has never been adopted in this state by usage or statute, it would be nothing less than usurpation of legislative power by this court to declare that rule to be the law of this state because courts in other states have so held. That the rule in question is unsound in principle and unjust, is almost universally admitted, and the courts are showing an increasing tendency to discard it. We think, therefore, that we are showing no disrespect to precedent in taking the stand towards which the modern decisions are unmistakably tending, and from which it is generally conceded there should have never been any departure. We, therefore, reject as unsound the doctrine that a drawee of a check should be excepted from the general rule in relation to the recovery of money paid by mistake. The drawee is presumed to know the signature of the drawer of the check or draft; and the holder of such check or draft who has acquired it in good faith has the right to act in reliance on that presumption, provided he himself has omitted no duty, the performance of which would have prevented the success of the fraud. Consequently, if the drawee pronounces the check genuine by paying it or otherwise honoring it, the holder who has acted in good faith and without negligence, may safely rely upon the judgment of the drawee, and act accordingly. The drawee cannot, under such circumstances, recall his acceptance or payment to the detriment of the party who has rightfully relied upon his decision. In such a case the party who received the money has the superior equity, and he may justly retain the money although he was not originally entitled to receive it.

But, as is usually the case, when the party who has collected the check had previously cashed it or taken it in exchange for commodities, there is no reason why he should not refund. Every one with even the least experience in business knows that no business man would accept a check in exchange for money or goods unless he is satisfied that the check is genuine. He accepts it only because he has proof that it is genuine, or because he has sufficient confidence in the honesty and financial responsibility of the person who vouches for it. If he is deceived he has suffered a loss of his cash or goods through his own mistake. His own credulity or recklessness, or misplaced confidence was the sole cause of the loss. Why should he be permitted to shift the loss due to his own fault in assuming the risk, upon the drawee, simply because of the accidental circumstance that the drawee afterwards failed to detect the forgery when the check was presented? Our views find much support in many of the cases which still cling more or less tenaciously to the negligence rule, notably the following: *Bank v. Bank*, 151 Mass. 280; *Ellis & Morton v. Trust Co.*, 4 Ohio St.

628; *Bank v. Bank*, 88 Tenn. 299; *Bank v. Bingham*, 30 Wash. 484; *Bank v. Bank*, 22 Neb. 769; *Bank v. Bank*, 4 Ind. App. 355. The case of *McKleroy & Bradford v. Southern Bank*, 14 La. Ann. 458, 74 Am. Dec. 438, directly supports our views, and we are gratified to note that our views are in accord with those generally advocated by the text-writers. We, therefore, hold that drawees of checks and drafts are not to be excepted from the general rule which permits the recovery of money paid by mistake. We hold that a drawee who has by mistake paid a spurious check or draft may recover the money paid unless the party receiving the money has been misled to his prejudice by the drawee's mistake. If any such facts exist, they are best known to the defendant, and it is his duty to prove them. The complaint discloses *prima facie* cause of action by alleging the payment by mistake.

The order appealed from must be reversed, and the demurrer overruled. All concur.<sup>1</sup>

## § 112 STATE BANK OF CHICAGO *v.* FIRST NATIONAL BANK OF OMAHA.

127 NORTHWESTERN (NEBRASKA) 244. — 1910.

Root, J. This is an action by the drawee of a forged draft to recover from a holder thereof money paid to satisfy that instrument. The plaintiff prevailed upon the defendant's demurrer to the petition. The defendant appeals.

The plaintiff alleges in its petition that the defendant, through its agent, the Continental National Bank of Chicago, on November 29, 1907, caused to be presented to the plaintiff, through the Chicago Clearing House, a certain draft of which the following is a copy:

\$800.	THE GERMAN BANK.	No. 9,638.
	EUREKA, SOUTH DAKOTA, Nov. 23, 1907.	
Pay to the order of Chas. Viterna, \$800.00, eight hundred . . . . .	dollars.	
	E. Moog, A. Cashier.	

To the State Bank of Chicago, Chicago, Ill.

The instrument was indorsed: "Chas. Viterna. Pay to the order of Continental National Bank, Chicago, Ill., First National Bank, Omaha, Nebr. L. L. Kountze, Cashier."

The plaintiff further alleges that, believing the instrument to be the genuine draft of said E. Moog, it accepted the same and paid it to the defendant through the Continental National Bank; "that the defendant, prior to the presentation, acceptance and payment of said draft as hereinbefore alleged, paid to Charles Viterna named in said draft as payee, knowing him to be said Viterna, eight hundred

<sup>1</sup> This case is reported in 10 L. N. S. 49, with exhaustive note entitled "Right of drawee of forged check or draft to recover money paid thereon."—C.



dollars (\$800), the amount named in said draft, without any knowledge or information as to whether said draft would be accepted or paid by the plaintiff, and without taking any steps to ascertain whether or not said draft was a genuine draft of the above-named E. Moog, assistant cashier of the German Bank of Eureka, South Dakota." The plaintiff also alleges the draft was forged, but its true character did not become known until December 12, 1907. Immediately thereafter the plaintiff advised the defendant of said fact and demanded repayment of the \$800, which demand was refused. Counsel for the respective litigants stated at the bar that the negotiable instruments statute does not control this case, and we shall treat their statement as correct for the purposes of this case.<sup>2</sup>

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<sup>2</sup> But see *National Bank of Rolla v. First National Bank of Salem*, 125 Southwestern (Springfield Ct. App., Mo.) 513. At page 516, GRAY, J., said:

"From a review of these authorities, we are satisfied that leaving out of view our Negotiable Instrument Act of 1905 (Laws 1905, p. 243 [Ann. St. 1906, §§ 463—1 to 463—197]), the great weight of the modern cases sustains the theory that the payee [drawee?] cannot recover from the purchaser without basing his action upon the negligence of the latter. In *Germania Bank v. Boutell*, *supra*, the demurrer to the petition was sustained because there was no allegation of negligence on the part of the defendant. . . .

"In addition to the authorities, the Negotiable Instrument Act of 1905 contains the following sections:

"Section 62. [N. Y., § 112.] The acceptor, by accepting the instrument engages that he will pay it according to the tenor of its acceptance; and admits: The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument; and the existence of the payee and his capacity to indorse."

"Section 188. [N. Y., § 324.] Where the holder of a check procures it to be accepted or certified, the drawer and all indorsers are discharged from liability thereon."

"Judge BROADDUS, in *Bank v. Bank*, 109 Mo. App. 665, *supra*, in answer to the argument that absolute payment was not an acceptance, said: 'An acceptance binds the acceptor to pay the bill, and he cannot be heard to deny that he has funds in his hands for the purpose. A payment of the bill is more than an acceptance, for the one is an obligation to pay; the other a discharge of the indebtedness represented by such bill. If the one concludes the drawee it is inconceivable why the other would not.' We fully concur in the views of Judge Broaddus, as quoted above. If a mere promise to pay a check is binding on the bank, why should the absolute payment of the check not have the same effect? The adoption in this and other states of our Negotiable Instrument Law was for the purpose of having in the statutory laws of the states a uniform law in regard to commercial paper. A confusion was known to exist on many of the everyday transactions concerning such paper, and it may be said that there was no question upon which the courts were more in conflict than upon the question involved in this case. After a careful examination of the new law, we are inclined to believe that it was intended to adopt the law as declared in *Price v. Neal*, *supra*."

Followed in *National Bank of Commerce v. Mechanics' Am. Nat. Bank*, 127 Southwestern (St. Louis Ct. App., Mo.) 429.

These two cases are criticised in 70 Central Law Journal (June 10, 1910) 417-418.

1. The great weight of authority sustains the proposition that as between the drawee and a good faith holder of a draft, the drawee bank is to be deemed the place of final settlement, where all prior mistakes and forgeries shall be corrected and settled once for all; and if not noticed and payment is made, the money cannot be recovered back. *Price v. Neal*, 3 Burrows, 1355. *Germania Bank v. Boutell*, 60 Minn. 189. The cases are annotated in a note to *First National Bank v. Bank of Wyndmere*, 15 N. D. 299, 10 L. R. A. (N. S.) 49, 125 Am. St. Rep. 588 [reported herein at p. 403.] Courts and text-writers generally recognize that the preponderance of authority is in favor of the rule, but it seems to conflict with a well-established principle of law that money paid by mistake may be recovered back, and has not been accepted without qualification by all of the American courts. North Dakota refuses to follow *Price v. Neal*, *supra*, and has held that the principles of equity should control a transaction

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The court in *Nat. Bank of Rolla v. First Nat. Bank of Salem*, *supra*, stated that "In support of our views, we are sustained by the late case of *Title Guarantee & Trust Co. v. Haven*, 126 App. Div. (N. Y.) 802." While this latter case was reversed in 196 N. Y. 487, nevertheless the N. Y. Court of Appeals, in a dictum, also expressed the opinion that section 112 of the N. Y. Negotiable Instruments Law codified the rule enunciated in *Price v. Neal*. WILLARD BARTLETT, J., at p. 492, said:

"Both the referee and the judge who wrote the prevailing opinion below thought that the case was controlled by section 112 of the Negotiable Instruments Law which provides that the acceptor of a negotiable instrument admits 'the existence of a drawer, the genuineness of his signature, and his capacity and authority to draw the instrument.' This enactment is merely declaratory of the common law. The leading English case in which it is enunciated is *Price v. Neal* (3 Burrow, 1354), decided by Lord MANSFIELD in 1762. The leading New York case to the same effect is *National Park Bank v. Ninth National Bank* (46 N. Y. 77). But the doctrine of these decisions, now found in the rule formulated by section 112 of the Negotiable Instruments Law, applies only in favor of one who is a holder for value of the instrument which turns out to have been forged. Thus, Lord MANSFIELD in *Price v. Neal* (*supra*) dwelt upon the fact that the bill of exchange there in question had been indorsed to the defendant 'for a fair and valuable consideration which he had *bona fide* paid;' and in the leading New York case (*National Park Bank v. Ninth National Bank*, *supra*) it appeared that the draft had been discounted by the Livingston National Bank and indorsed to the defendant which was a *bona fide* holder. The rule, therefore, that he who accepts a negotiable instrument to which the drawer's name is forged is bound by the act and can neither repudiate the acceptance nor recover the money paid, has no application in behalf of one who has acquired the paper in the absence of any consideration whatever therefor either present or past. Such was the case here according to the finding of the referee. So far as appears, the check of the Green estate, which proved to be forged, was not given in payment of any existing or antecedent indebtedness either on the part of that estate or even of the forger. For these reasons we agree with the learned judge who wrote for the minority in the Appellate Division, saying: 'Section 112 of the Negotiable Instruments Law upon which the referee based his decision has nothing to do with the question.'" — C.

between the drawee and a holder of a forged check or draft. *First National Bank v. Bank of Wyndmere*, *supra*. The position assumed by North Dakota is in harmony with suggestions made by many text-writers but, so far as we are advised, is not sustained by the opinion of any other court. Intermediate the cases adhering to the ancient rule, and *First National Bank v. Bank of Wyndmere*, one may find cases qualifying the broad rule promulgated in *Price v. Neal*, *supra*.

The Massachusetts Supreme Court holds that the failure of the drawee to detect the forgery at the time the draft is presented and paid will not preclude it from recovering the money from a holder "who took the check under circumstances of suspicion without proper precaution, or whose conduct has been such as to mislead the drawee or induce him to pay the check without the usual security against fraud." *Danvers Bank v. Salem Bank*, 151 Mass. 280, 283. In the cited case the cashing bank received a check from an unknown person payable to bearer and without requiring him to identify himself, although there was a local custom requiring identification in such cases. It was held that the negligence of the cashing bank lulled the drawee into a false sense of security, and the latter could recover back the money paid. In *National Bank of North America v. Bangs*, 106 Mass. 441, 444, the court holds the drawee should be permitted to recover if the party receiving the money in any manner contributed to the success of the fraud, or to the mistake of fact under which the payment was made.

The plaintiff relies upon our decision in *First National Bank of Orleans v. State Bank of Alma*, 22 Neb. 769. That case was decided upon a statement of facts to the effect that B. R. Claypool maintained a deposit in each of said banks. A stranger presented to the Orleans bank a check upon the Alma bank bearing the name of Claypool as drawer, and payable to A. J. Gype, or bearer. The Orleans cashier compared the signature to the check with Claypool's genuine signature upon the bank's book and without requiring the holder to identify himself or to account for the manner in which he secured possession of the check, paid it. In due course, through a bank wherein the litigants each maintained a deposit, the check was paid and charged to the account of the Alma bank and later was delivered to Claypool, who denounced the instrument as a forgery. We held that the drawee should recover the money paid. Some remarks in the argument of our late Chief Justice, taken apart from the facts in the case, lend color to the plaintiff's argument in the instant one. At the bar it was argued that since the check on the Alma bank was payable to bearer, identification of the holder was an immaterial fact, and the entire argument in the opinion should be considered with relation to the obligation of the cashing bank to ascertain at its peril that the check was a genuine instrument. The principle underlying the opinion is that the cashing bank was negligent in not availing

itself of all means at its command to ascertain whether the check was genuine. Business men and courts alike recognize that ordinary prudence forbids the purchase of a check from a stranger, regardless of whether the paper was payable to order or bearer. The instrument considered in the Alma case was an ordinary check not designed for circulation but for immediate presentment. *First National Bank of Wymore v. Miller*, 37 Neb. 500. As stated by Judge Maxwell, the Alma bank did not know but that Claypool had been present when the check was presented by the holder to the Orleans bank, and had the cashing bank made inquiries concerning the identity of the holder or the manner in which he became possessed of the instrument, the probabilities are that he would not have withstood the ordeal, but the fraud would have been discovered. In *Germania Bank v. Boutell*, *supra*, the duty of the cashing bank to require the holder to identify himself is recognized. The rule stated in the Orleans case has been adopted in Massachusetts, in *People's Bank v. Franklin Bank*, 88 Tenn. 299; *Canadian Bank of Commerce v. Bingham*, 30 Wash. 484, and has been recognized in *First National Bank of Marshalltown v. Marshalltown State Bank*, 107 Iowa, 327.

In *Ellis v. Ohio, L. I. & T. Co.*, 4 Ohio St. 628, 64 Am. Dec. 610, a local custom obtained among the banks of Cincinnati requiring the cashing bank, before purchasing a check presented by a stranger and drawn upon another bank, to make careful inquiry concerning his identity and to ascertain whether the paper was genuine and the holder was the owner thereof. The opinion turns upon the holder's negligence in failing to comply with this local custom.

In the case at bar, Viterna was payee of the forged draft and was known to the defendant at the time it purchased the bill. The draft purports to be a foreign bill of exchange, an instrument that for many purposes is intended to circulate as money for a limited period of time; the forgery consisted in forging the name of the drawer and not in raising the amount of a genuine bill, and the drawer maintains its place of business in a neighboring state. The plaintiff does not plead that any suspicious circumstances surrounded the purchase of the bill by the defendant, that Viterna was not a man of fair character or so situated that the possession and presentation by him of a draft for \$800 would excite suspicion in the mind of any prudent banker, nor does the plaintiff charge that at any time prior to the presentation of said instrument, the defendant acquired any knowledge or entertained a suspicion concerning the forgery which it withheld from the plaintiff. The plaintiff does charge that the defendant did not take any steps to ascertain whether the draft was genuine or would be paid, but the statement, admitted by the demurrer to be true, must be taken into consideration in connection with the fact that the drawer was in South Dakota, the drawee in Chicago, and the payee was known to the defendant, a resident of Nebraska. It is not

pleaded that there was an agreement between the litigants that drafts drawn on each other should not be cashed if presented for sale by a payee known to the cashing bank, unless it first made inquiry concerning the instrument, or that any such custom obtained in Omaha or Chicago, or that the defendant had any means at hand whereby it could have ascertained the genuineness of Moog's signature. In fact, so skillfully was that signature forged that it deceived the drawee so that had Viterna been acquainted with the paying teller or other employe or officer charged by the plaintiff with the duty of identifying signatures to its customers' drafts, it is more than probable that it would have cashed the draft if the payee had presented the instrument for payment.

In the Orleans case the cashing bank had the drawer's genuine signature to compare with the name attached to the check, and it also had the power to demand that the holder should identify himself; it availed itself of but one safeguard against fraud and we are entirely satisfied with our opinion holding that under the circumstances the Orleans bank was guilty of negligence. But in the case at bar it is not alleged that the defendant had any means other than the identity of the payee to prove the genuineness of the draft. Until the legislature shall provide that a bank is guilty of negligence in purchasing a foreign draft, fair on its face, from a known payee, unless it first communicates with the drawer and the drawee to learn whether the draft is genuine, we do not feel justified in extending the rule announced in the Orleans case, *supra*. Drafts aggregating many billions of dollars in value have been issued, negotiated, accepted, and paid by merchants and bankers in reliance upon the rule announced in *Price v. Neal*, *supra*, and to the general satisfaction of the commercial world. So far as we are advised, in but one state of the Union, Pennsylvania, has the legislature modified that rule.<sup>3</sup> Merchants and bankers in the great centers of the English speaking world, have not moved the legislatures to modify this principle of the law merchant, and the courts should hesitate before substituting the philosophy of logicians for a practical rule evolved from the necessities of commerce.

The plaintiff also cites *First National Bank of Crawfordsville v. Indiana National Bank*, 4 Ind. App. 355, but it should not be seriously considered as an authority in the case at bar because it refers to a forged school order which the learned judge writing that opinion states, at page 363 of 4 Ind. App., is not negotiable according to the law merchant. The court also holds the indorsement "for collection" by the holder of the order tended to divert scrutiny by the drawee of the drawer's signature, because such an indorsement would indicate the instrument was not circulating as negotiable paper.

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<sup>3</sup> For the terms of this statute and the construction placed upon it by the Pennsylvania courts, see *Iron City Nat. Bank v. Fort Pitt Nat. Bank*, 159 Pa. 46. — C.

The plaintiff further cites *First National Bank of Chicago v. Northwestern, N. B. of C.*, 40 Ill. App. 640. This case was appealed to the Supreme Court of that state and is reported in 152 Ill. 296. In that case checks purporting to have been drawn by the Central Union Telephone Company upon the Northwestern National Bank of Chicago, payable in four instances to "F. P. Ross, Manager" and in one case to "C. H. Wilson, A. G. Supt." were received by the First National Bank through the clearing house. The proof established that the payees were employes of the telephone company but were not entitled to the checks, knew nothing about them, and their indorsements, as well as the signature of the drawer, had been forged. The court holds that while the drawee by paying a draft is estopped from thereafter denying the drawer's signature, it does not warrant the signature of any indorser, but the indorser warrants the genuineness of all preceding indorsements; that the parties stood as though the bills were genuine but the indorsements of the payees forged, and the drawee for that reason could recover the money paid by it to the holder of the paper. The opinion is sound but has no application to the instant case, because there were no forged indorsements upon the bill in question.

*Ford v. People's Bank*, 74 S. C. 180, is cited by the plaintiff. In that case the plaintiff's drawee paid a forged draft and charged in his petition to recover back the money: "That the plaintiffs paid the said draft upon presentation, upon the faith and credit of the indorsement of the said defendant." A general demurrer to the petition was sustained and the Supreme Court of that state holds that a general indorsement of a forged bill by the holder thereof is a representation that the drawer's signature is genuine upon which the drawee may rely, and, in case the instrument is forged, may recover back money paid the holder.<sup>4</sup> The opinion is against the weight of

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<sup>4</sup> In the case just referred to, JONES, J., at p. 184, said: "The question whether the demurrer was properly sustained depends upon the meaning to be attached to the alleged presentation and indorsement of the draft by the defendant. Does such presentation and indorsement to the drawee represent that the signature of the drawer is genuine, or does it merely represent that the instrument is genuine as it purports to be in all respects, except as to the signature of the drawer, which the drawee is presumed to know? Mr. Daniel, in his work on negotiable instruments, takes the view that an indorsement engages that the bill or note is genuine. Volume 1. §§ 672, 673; volume 2, § 1361. The case of *Germania Bank v. Boutell*, 60 Minn. 189, takes the view that an indorsement by a holder other than the original payee constitutes no representation or guarantee to the drawee that the signature of the drawer is genuine, but we think that the weight of reason and authority is against that view, at least to the extent that an unrestricted indorsement is calculable to mislead the drawee into a belief that the paper was what it purported to be. *People's Bank v. Franklin Bank*, 88 Tenn. 299; *Bank of Danvers v. Bank of Salem*, 151 Mass. 280; *First National Bank v. First National Bank*, 4 Ind. App. 355; *Woods & Malone v. Colony Bank*, 114 Ga. 683. The case of *National*

authority and is not supported by any of the cases cited by that court upon this point, except the case of *Woods & Malone v. Colony Bank*, 114 Ga. 683, and the opinion filed in the last-named case cites *National Bank v. Bangs*, *supra*, in support of the principle announced by it and later by the South Carolina court.

In the Massachusetts case the cashing bank was named as payee in a forged check payable to its order, so the instrument could not become current except by the bank's indorsement. The court holds that the payee was negligent in taking the check from a stranger without proof of his identity, and by indorsing the check, gave it currency and standing. In the Georgia case the draft was payable to bearer, and the opinion is sound, based upon the negligence of the cashing bank in not requiring the party from whom it purchased the instrument to identify himself, but so far as it holds upon the reported facts, that the indorsement by the holder was a warranty to the drawee that the drawer's signature was genuine, it is unsound in principle and will not be accepted as a correct statement of the law.

*First National Bank v. Wyndmere*, cited by plaintiff, *supra*, does sustain its argument, but we are of opinion that the Orleans case, *supra*, commits this court to the doctrine that the drawee must establish the cashing bank's negligence, or bad faith, to justify a recovery. Since the drawee should only recover in this suit in case the cashing bank was negligent or has acted in bad faith, the burden is upon the former to plead such negligence or *mala fides*. The pleader in the instant case in our opinion has not stated in his petition facts sufficient to establish that the defendant was negligent, or that it acted in bad faith in purchasing from Viterna the forged draft in question.

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*Bk. Belmont v. National Bk. Barnesville*, 58 Ohio St. 207, while holding that a restricted indorsement as 'for collection' has not that effect, apparently concedes that an unrestricted indorsement does have that effect."

This case is reported in 7 A. & E. Ann. Cas. 744, with note entitled "Unrestricted indorsement of draft or check as warranty that instrument is genuine."

As to the bearing of the Negotiable Instruments Law upon the doctrine of *Ford v. People's Bank*, *supra*, attention is called to the following comment of Mr. Crawford on section 116 of the New York Act, providing that "Every indorser who indorses without qualification, warrants to all subsequent holders in due course," etc. On page 90 of the third edition of his work on the Negotiable Instruments Law, the draftsman of the Act says: "Under this section, as under the rule of the law merchant, the warranty is in favor of subsequent holders only, and since the adoption of the statute, as well as before, the indorser does not warrant to the drawee that the signature of the drawer is genuine. *Farmers' and Merchants' Bank v. Bank of Rutherford*, 115 Tenn. 64, 70-71. Thus, if a check purporting to be drawn by A. should be indorsed by B. and cashed by C., the indorsement of B. would be a warranty in favor of C., but not in favor of the bank on which the check is drawn."

But see *Williamsburgh Trust Co. v. Tum Suden*, 120 App. Div. (N. Y.) 518, reported herein at p. 417. — C.

The judgment of the District Court, therefore, is reversed, and the cause remanded for further proceedings.<sup>5</sup>

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§ 112 WILLIAMSBURGH TRUST COMPANY *v.* TUM SUDEN.

120 APPELLATE DIVISION (NEW YORK) 518. — 1907.

APPEAL by the plaintiff, the Williamsburgh Trust Company, from a judgment of the Municipal Court of the city of New York, borough of Brooklyn, in favor of the defendant, rendered on the 10th day of January, 1907.

WOODWARD, J.:

This is an action to recover money paid by mistake — the amount of four certain checks payable to bearer which were forgeries, purporting to be signed by L. F. Rand and indorsed by Peter R. Tum Suden. The checks with Tum Suden's single and unqualified indorsement were presented and paid to him by the plaintiff. It was shown at the trial that Tum Suden had been in the habit of cashing checks for Rand, and that the forged checks were cashed, in part, for a maid servant in the employ of Rand, the other part of their face value being retained by Tum Suden for groceries previously furnished to Rand. As the checks were negotiable without indorsement, it is evident that Tum Suden's indorsement would divert the trust company from that careful scrutiny which otherwise it would have been likely to give them. It was Tum Suden who negotiated the checks and put them into circulation, and as by his unqualified indorsement he facilitated the forgery his position is not that of an indorsee who holds a forged check sanctioned by a prior indorsement.

If Tum Suden suffered loss or damage by cashing the checks, it is evident that such loss was sustained before the checks were honored by the trust company. I fail to see, therefore, how the trust company, when it paid the checks, can be held responsible for a loss previously sustained. As there is no proof that the mistake of the trust company has been to the prejudice of the respondent, it is but right that he should refund the money had and received.

The evidence shows that Tum Suden, for several months prior to the time of these forgeries, had been accustomed to cash checks for Rand. It follows, therefore, that Tum Suden, who had had every opportunity to become acquainted with Rand's signature, has no right

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<sup>5</sup> For a late case affirming in general the doctrine of *Price v. Neal*, see *Bank of Williamson v. McDowell County Bank*, 66 S. E. (W. Va. 1909) 761, where the whole subject is exhaustively considered, and the note to this case is 49 Am. Law Reg., N. S., p. 438 (April, 1910).

See also *United States v. Nat. Exch. Bank of Providence*, 214 U. S. 302, and note in 8 Mich. Law Rev. 140 (December, 1909). — C.



to shift the loss resulting from his own fault, oversight or negligence, upon another. On the other hand, it was but natural for the bank to assume that Tum Suden's indorsement warranted the genuineness of the signature. It was Tum Suden who had the first contact with the forger, and who first failed to detect the forgery, and upon him, therefore, must fall the burden of loss. From the foregoing it will appear that the case at bar presents an interesting exception to the case of *Price v. Neal* (3 Burr. 1354), which ruled that the bank must bear the loss when it pays a check to which the drawer's name is forged. Such exceptions, however, have long ceased to be unusual.

In *National Bank, etc., v. Bangs* (106 Mass. 441) the court said: "We are aware of no case in which the principle that the drawee is bound to know the signature of the drawer of a bill or check, which he undertakes to pay, has been held to be decisive in favor of a payee of a forged bill or check to which he has himself given credit by his indorsement." The same principle should be applied here. Upon the first indorser is the burden of the first precaution, and his negligence or omission will exonerate, as in the present instance, the bank. Had a third party presented the check, already in circulation, for payment, the bank would have been put upon inquiry, and for any negligence in that case it would have been responsible.

In *First National Bank of Danvers v. First National Bank of Salem* (151 Mass. 281) the court uttered a principle of construction which justifies my view: "The indorsement, which was not necessary to the transfer of the check, was a guaranty of the signature of the drawer, and the plaintiff had a right to believe that the indorser was known to the defendant by proper inquiry."

The judgment should be reversed and a new trial ordered, costs to abide the event.

JENKS, HOOKER and RICH, JJ., concurred.

Judgment of the Municipal Court reversed and new trial ordered, costs to abide the event.<sup>6</sup>

### III. Drawer: secondary, conditional liability.

#### 1. CONDITIONS: PRESENTMENT; NOTICE; PROTEST.

[SEE ART. VII, VIII, XIII, *post*.]

#### 2. ADMISSIONS AS TO PAYEE.

### § 111

#### GREY *v.* COOPER.

3 DOUGLAS (K. B.) 65. — 1782.

ACTION against drawer by indorsee. Plea, that the payee-indorser at the time of his indorsement was an infant. Demurrer.

<sup>6</sup> See criticism of this case in 47 Am. Law Reg., N. S., 122 (February, 1908). See also note 4, *ante*, p. 415. — C.

LORD MANSFIELD.—The ground on which the drawer is charged is that he drew a bill by which he engaged to pay according to the order of the payee, whoever that payee might be. He might give the infant an authority which the law itself does not give him. In the same manner he may give a bill to his own wife. The drawer says, "Let anybody trust the payee on my credit." The acts of an infant are void or not, accordingly as they are for his benefit. The privilege of an infant is personal, and there is no question here as between the infant and another person. The infant sets up no claim, and the drawer is liable to pay.

Judgment for the plaintiff.<sup>7</sup>

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#### IV. Seller: warranties.

##### 1. INSTRUMENT GENUINE AND WHAT IT PURPORTS TO BE.

§ 115

MEYER *v.* RICHARDS.

163 UNITED STATES, 385. — 1896.

ACTION to recover back the purchase price of thirteen bonds of the State of Louisiana, payable to bearer, sold by defendant to plaintiff, and afterwards discovered to have been issued without authority of law and declared by the constitution of the state to be null and void. The bonds were in the state treasury for cancellation and were fraudulently issued by the state treasurer, who put them on the market surreptitiously and without authority. The signatures and seal were genuine. Judgment for defendant.

MR. JUSTICE WHITE, after stating the case, delivered the opinion of the court.

We will \* \* \* consider the case upon the theory that the only warranty, if any, is one to be implied from the nature of the contract.

It is obvious from the facts just detailed that the thirteen bonds which were sold by the defendant in error to the plaintiff in error were at the time of the sale absolutely void. The twelve which originally belonged to the two college funds were in express terms declared by the constitution of the state to be "null and void," and the General Assembly was forbidden to make any provision "for their payment," and they were ordered to be "destroyed in such manner as the General Assembly may direct." This provision of the constitution was in existence while the bonds were in the hands of the state, and before they were fraudulently and surreptitiously sold. Indeed, these bonds were never lawfully put into circulation,

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<sup>7</sup> See also *Frazier v. Massey*, 14 Ind. 382, *ante*, p. 220; *McMann v. Walker*, 31 Colo. 261 *ante*, p. 401, and notes to those cases. — C.

because, having been originally issued to represent trust funds belonging to the state, they were held by officers of the state for its account. The remaining bond was also void under the constitution of the state, since it had been, under the express terms of that instrument, surrendered to the state treasurer for cancellation and another bond issued in its stead.

The bonds were undoubtedly sold by the defendant in error as lawful obligations of the state. Both parties to the contract of sale so considered. The pleading and the statement of facts leave no question on this subject. The controversy here presented is wholly between the vendor and vendee as to the nature and extent of the obligation of warranty resulting from the sale. We are therefore not concerned with whether the defendant at the time of the sale stood in the attitude of a third holder of negotiable paper for value before maturity. Even if he were in such a condition, and at the time of the sale there was a constitutional provision which rendered the bonds void and incapable of enforcement, it is clear that the delivery by the vendor to the vendee of bonds stricken with constitutional nullity was not the delivery of an existing obligation within the meaning of the contract if it imported a warranty of the existence of the bonds which it covered. The admission being that both parties contemplated the delivery of valid obligations, bonds of that character being outstanding, if warranty of existence was implied by law, such purpose was not fulfilled by the delivery of a mere equity, which one of the parties, the seller, claims was existing in his behalf. Valid bonds, and not the mere claim by the seller to enforce invalid bonds, was the object of the contract. This is especially true in view of the fact just referred to, that at the date of the sale the constitution of the state in express terms forbade the enforcement of twelve of the bonds, and practically stipulated to the same effect as to the other.

The sale was a Louisiana contract. We must consequently determine the rights and obligations of the parties by the law of that state. By the civil law, which prevails in Louisiana, warranty whilst not of the essence, is yet of the nature of the contract of sale, and is, therefore, implied in every such contract unless there be an express stipulation to the contrary. (*Bayon v. Vavas seur*, 10 Martin, 61; *Strawbridge v. Warfield*, 4 Louisiana, 20.) The following provisions on the subject of warranty are found in the Louisiana code:

“The seller is bound to two principal obligations, that of delivery and that of warranting the thing which he sells.” (C. C. 2475.) “Although at the time of the sale no stipulations have been made respecting the warranty, the seller is obliged, of course, to warrant the buyer against the eviction suffered by him from the totality or part of the thing sold and against the charges claimed on such thing which were not declared at the time of the sale.” (C. C. 2501.) “Even in case of stipulation of no warranty, the seller in case of

eviction is liable to a restitution of the price, unless the buyer was aware, at the time of the sale, of the danger of the eviction, and purchased at his peril and risk." (C. C. 2505.)

These articles of the Louisiana Civil Code, which do but formulate the principles of the civil law as to warranty, are not wholly in accord with the doctrines of the common law. The distinction between the two systems may be briefly summed up by saying that the one, the civil-law doctrine, finds its expression in the maxim *caveat venditor*, whilst the rule of the common law is conveyed by the aphorism *caveat emptor*. It is unnecessary to determine the scope, under the Louisiana law, of the obligation of warranty as to property generally, since we are in this case concerned only with its limit when arising from the sale of a credit or other incorporeal right. The code of that state contains express provisions defining the extent of the obligations arising in such case:

"He who sells a credit or an incorporeal right, warrants its existence at the time of the transfer, though no warranty be mentioned in the deed." (C. C. 2646.) "The seller does not warrant the solvency of the debtor unless he has agreed so to do."<sup>8</sup> (C. C. 2647.)

These provisions, instead of causing the obligation of warranty in a sale of an incorporeal right to be broader than in the case of tangible property, on the contrary makes its narrower.

As then, under the law of Louisiana, the seller under the contract of sale was obliged to warrant the existence of the thing sold, the case of the defendant in error involves the practical contention that a bond which at the time of the sale was declared by the constitution of the state to be non-existing, is yet for the purposes of the sale to be treated as an existing obligation. This proposition is an obvious contradiction in terms, and of course refutes itself. [Citing authorities from Louisiana and French courts.] \* \* \*

Of course, this warranty of existence, as established by the law of Louisiana and as found in France and other civil-law countries, does not govern a contract of sale when the object contemplated by a sale is a thing whether existing or not existing; in other words, where the parties buy, not an existing obligation, but the chance of there being one. This is illustrated by *Knight v. Lanfear* (7 Rob. [La.] 172), where the court, per Martin, J., said, in speaking of the thing sold: "Whatever may be its value, if it be not in substance what the purchaser believed he was receiving, his error must invalidate the sale, because it prevented his consent; *non videtur, qui errat, consentire*." And, in speaking of a sale of doubtful or non-existing things, this great judge said: "This claim was a fair object of sale if its nature had been disclosed, but that was concealed and was probably unknown

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<sup>8</sup> See *Brown v. Montgomery*, 20 N. Y. 287, *post*, p. 435. — H.

to them, and what was offered for sale was something quite different from this claim." The same distinction has been considered and applied by the courts of France. (*Dulac c. Clusel et Cie.*, Lyons, Nov. 30, 1849, *Journal du Palais*, 1, 1852, 32.)

The defendant in error does not dispute that the foregoing principles exist in and are controlling under the Louisiana law, under the law of France, and also under the civil law generally from which the law of Louisiana is derived. But whilst thus admitting, he denies that the contract of sale, involved in this case, was governed either by the Louisiana code or the general principles of the civil law. This proposition rests on the contention that when the Civil Code of Louisiana was compiled, its framers contemplated the simultaneous enactment of a Commercial Code which was then drafted, and therefore omitted from the former code the necessary provisions to govern commercial contracts, under the hypothesis that the latter would also be enacted; that in consequence of the failure to adopt the Commercial Code, the courts of Louisiana have held that cases arising under the law merchant are governed by that law in the absence of an express statutory requirement to the contrary. From this premise the conclusion is drawn that as the contract in question involved the sale of negotiable bonds, the obligations resulting from the sale are commercial in their nature, and are controlled by the law merchant, by which it is asserted the vendor in such a case, when selling in good faith, warrants only that the signatures to the paper sold are not forgeries. In a restricted sense the part of the proposition relating to the operation of the law merchant, in the state of Louisiana, is well founded. (*Harrod v. Lafayre*, 12 Martin, 29; *Wagner v. Kenner*, 2 Rob. La. 122; *Barry v. Insurance Co.*, 12 Martin, 498; *McDonald v. Milloudon*, 5 Louisiana, 403.) Whilst this is true, the contention is yet erroneous in a twofold sense; first, in presupposing that a mere contract of sale of commercial paper, without recourse, is governed as to the obligations, between the vendor and vendee, by the law merchant; second, in assuming that in such a sale, either under the principles of the civil law or what the argument presumes to be the law merchant, the only warranty resting upon the vendor is that of the genuineness of the signatures to the paper sold. [Citing authorities from Louisiana and French courts.]

None of the authorities referred to by counsel for defendant in error sustain the proposition heretofore stated with reference to the supposed existence and applicability of the law merchant, and the results which it is claimed flow therefrom. On the contrary, both in England and in the United States the doctrine is universally recognized that where commercial paper is sold without indorsement or without express assumption of liability on the paper itself, the contract of sale and the obligations which arise from it, as between vendor and vendee, are governed by the common law, relating to

the sale of goods and chattels. So, also, the undoubted rule is that in such a sale the obligation of the vendor is not restricted to the mere question of forgery *vel non*, but depends upon whether he has delivered that which he contracted to sell, this rule being designated, in England, as a condition of the principal contract, as to the essence and substance of the thing agreed to be sold, and in this country being generally termed an implied warranty of identity of the thing sold.

Benjamin on Sales (4th Am. ed., sec. 600), says:

"When the vendor sells an article by a particular description, it is a condition precedent to his right of action" [to recover the price agreed to be paid by the vendee] "that the thing which he offers to deliver, or has delivered, should answer the description;" [and, in sec. 607, the author says:] "Under this head may also properly be included the class of cases in which it has been held that the vendor who sells bills of exchange, notes, shares, certificates and other securities, is bound, not by the collateral contract of warranty, but by the principal contract itself, to deliver as a condition precedent that which is genuine, not that which is false, counterfeit or not marketable by the name or denomination used in describing it."

It is upon this general principle of the common law, not upon any peculiar doctrine of commercial law, that the cases in the common law courts proceed. [Discussing *Jones v. Ryde*, 5 Taunt. 488; *Fenns v. Harrison*, 3 T. R. 757; *Wilkinson v. Johnson*, 3 B. & C. 428; *Young v. Cole*, 3 Bing. N. C. 724; *Lamert v. Heath*, 15 M. & W. 486; *Gompertz v. Bartlett*, 2 El. & Bl. 849; *Gurney v. Womersley*, 4 El. & Bl. 133.]

The cases in the American courts, whilst declaring the same rule as that recognized in England, place it upon a theoretical basis differing somewhat from that pronounced by the English courts; that is, instead of pronouncing it a condition of the principal contract that the thing sold, in its essence and substance, must be delivered, declare that there is an implied warranty of identity, or, in other words, that the thing sold is what it purports to be. Daniel, in his treatise on Negotiable Paper (§ 733a), calls attention to the different definitions given to the same obligation by the American and English courts, and indicates the view that the form of expression used by Benjamin in the passage already quoted is the more accurate one.

Aside, however, from the mere garb in which the thought is clothed, the American and English courts are in full accord. This is shown by the case of *Utley v. Donaldson* (94 U. S. 29, 45), where Benjamin on Sales is approvingly referred to, as also *Flynn v. Allen* (57 Penn. St. 482), and *Webb v. Odell* (49 N. Y. 583), both of which cases, as also the line of American adjudications which enforce the same doctrine, are noted in the margin of this opinion.<sup>9</sup>

<sup>9</sup> *Thrall v. Newell*, 19 Vt. 202; *Lyons v. Miller*, 6 Gratt. 427; *Aldrich v*

Many of the controversies covered by the cases referred to arose in consequence of the sale of a forged note, but the principles upon which all the authorities proceed do not confine the right of recovery to such a case, but rest upon the general doctrine to which we have already referred. In fact, no case is reported wherein the obligation, as between vendor and vendee, in the sale of negotiable paper, is claimed to be controlled other than by the general principles of the common law, though in three cases, *Baxter v. Duren* (29 Maine, 434), *Fisher v. Rieman* (12 Maryland, 497); and *Ellis v. Wild* (6 Mass. 321), the deduction was made from the law respecting the sale of goods that on a sale of negotiable paper there was under the principle of *caveat emptor* no implied warranty even that the signatures to the paper were not forged. *Ellis v. Wild* was, however, expressly overruled in *Merriam v. Wolcott* (3 Allen, 258, 260); and from the allusions to *Baxter v. Duren*, contained in the later Maine decisions previously noted in the margin, it is doubtful whether the early ruling in Maine would now be followed there. The three cases referred to, it is needless to say, are practically disregarded by the entire current of American and English authority, and stand alone. They are disavowed by the defendant in error here, since his argument admits that there is a warranty of the genuineness of the signatures to an apparent negotiable instrument, thereby conceding the subsistence of the obligation to warrant the existence or identity of the thing sold, and yet seeking to avoid its consequences by limiting it to non-existence resulting from a particular nullity.

There is an exceptional case (*Littauer v. Goldman*, 72 N. Y. 506, — 1878), which holds that the common law obligation, as to the implied warranty of identity in the thing sold, in the case of commercial paper, extends only to the genuineness of the instrument. The case was one involving the nullity of a usurious note, and, if correctly decided, would be authority for the proposition that there was a peculiar species of warranty in the sale of commercial paper, differing from all others; in other words, that there was a law merchant of warranty where there was no commercial contract. The opinion

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*Jackson*, 5 R. I. 218; *Barton v. Trent*, 3 Head, 167; *Delaware Bank v. Jarvis*, 20 N. Y. 226; *Merriam v. Wolcott*, 3 Allen, 258; *Bell v. Cafferty*, 21 Ind. 411; *Swansey v. Parker*, 50 Penn. St. 441; *Morrison v. Lovell*, 4 W. Va. 346; *Webb v. Odell*, 49 N. Y. 583; *Worthington v. Cowles*, 112 Mass. 30; *Snyder v. Reno*, 38 Iowa. 329; *Giffert v. West*, 33 Wis. 617, 37 Wis. 115; *Hannum v. Richardson*, 48 Vt. 508; *Hussey v. Sibley*, 66 Me. 192; *Hurst v. Chambers*, 12 Bush (Ky.) 155; *Allen v. Clark*, 49 Vt. 390; *Bankhead v. Owen*, 60 Ala. 457; *Smith v. McNair*, 19 Kans. 330; *Challiss v. McCrum*, 22 Kans. 157; *Rogers v. Walsh*, 12 Neb. 28; *Milliken v. Chapman*, 75 Me. 306; *Daskam v. Ullman*, 74 Wis. 474; *Palmer v. Courtney*, 32 Neb. 773; *Ware v. McCormack*, 96 Ky. 139; *Brown v. Ames*, 59 Minn. 476.

in this case illustrates the same contradictory position presented here by the argument of the defendant in error, to which we have just called attention, that is, that it admits the common law rule and then denies its essential result by eliminating conditions of non-existence which are necessarily embraced by it. It follows that this New York decision leads logically to the view expressed in the Maine and Maryland cases just referred to, for either the principle of warranty of identity must be accepted or rejected; it cannot be accepted and its legitimate and inevitable results be denied. The rule there announced was in conflict with previous decisions in New York, and the decision is strongly criticised by the Court of Errors and Appeals of New Jersey in *Wood v. Sheldon* (42 N. J. L. 421, 425.)<sup>1</sup>

In *Giffert v. West* (33 Wisconsin, 617, — 1873), where a note was sold which was void for usury, the vendee was allowed to recover the consideration paid by him, and his right to do so was based upon the general doctrine that one making a sale is bound as a condition of the principal contract to an implied warranty of the existence of the thing sold.

[After discussing *Hannum v. Richardson*, reported herein at p. 432, the court continues:]

Nor is there any foundation for the assertion that *Otis v. Cullum* (92 U. S. 447), and the cases of *Orleans v. Platt* (99 U. S. 676), and *Etna Life Ins. Co. v. Middleport* (124 U. S. 534), both of which cite *Otis v. Cullum*, support the doctrine that a sale of commercial paper without recourse is not, as between the vendor and vendee, governed by the ordinary rule of the common law. On the contrary, that case expressly rested its conclusion on the decision in *Lamert v. Heath*, *supra*, which latter case, as we have seen, whilst enforcing

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<sup>1</sup> Notwithstanding the above criticism of *Littauer v. Goldman*, Mr. Crawford, in commenting on section 115 of the New York Negotiable Instruments Law, says: "It will be noted that the warranty mentioned in the next section, that the instrument is valid, is omitted from this section. The inference from such omission is, that a person negotiating commercial paper by delivery merely, or by a qualified indorsement, does not warrant that it is an enforceable contract, as, for example, that it is not void for usury. This was the New York rule (*Littauer v. Goldman*, 72 N. Y. 506), and while it has been criticised and disapproved by the Supreme Court of the United States (*Meyer v. Richards*, 163 U. S. 385), it seems to be the more convenient rule in practice. The contrary rule would often work great hardship, and would make the business of dealing in commercial paper extremely hazardous. A broker, for example, buying and selling notes and bills, may assure himself that an instrument is genuine, and that the parties had capacity to contract, but he could not always know the circumstances under which the paper was made. On the other hand, the New York rule which is conceived to be the rule of the statute, does no injury to the purchaser; for if he desires a warranty, he has only to exact it, or to require the indorsement of the seller (see section 117)." *Craw. Neg. Inst. Law* (3d ed.), p. 88. — C.



the principles of the common law, considered that under the particular facts there presented it was a question for the jury to determine whether the scrip delivered was the kind of scrip which the defendant had ordered purchased. That case not only, as has already been stated, concerned non-negotiable paper, but its decision involved no question of the scope of the warranty, but solely what was the thing bought. Nor does the case of *Otis v. Cullum* justify the assumption that this court laid down the rule that a mere sale of commercial paper, as between vendor and vendee, when the sale was made without recourse, created some peculiar and exceptional warranty to be considered in this particular as the law merchant. It is true that in expressing the general doctrine Mr. Justice Swayne said: "The seller is liable *ex delicto* for bad faith, and *ex contractu* there is an implied warranty on his part that they belong to him and are not forgeries. Where there is no express stipulation there is no liability beyond this." But in using this language, as to the extent of the warranty, the mind was directed to that form of non-existence which more commonly obtains, and the expression is a mere illustration of the rule *de eo quod plerumque fit*. If this were a case where a vendee claimed to recover back the price paid by him on a purchase of negotiable securities, which pass by delivery from hand to hand, on the averment that after the sale it had developed that they were not valid (although not forgeries), because the law under which they had been issued was constitutionally void or *ultra vires*, the claim of implied warranty of existence would be without merit, for the reason that such a state of fact would present a case of a sale of securities whether valid or invalid, hence engendering no implication of warranty of existence. Under the state of facts thus supposed, the purpose of the parties to make a contract of that nature would legally result from the fact that they were both necessarily equally chargeable with notice of want of power, and therefore would be both presumed to have acted with reference to such knowledge. This is *Otis v. Cullum*. But it is not the case at bar, since it is here admitted that both parties, in entering into the contract of sale, contemplated valid securities, of which there were many outstanding, and those delivered were void, not because of a want of power to enact the law under which they were issued, or because they were *ultra vires* for some other legal cause, but because they were stricken with nullity by a constitutional provision adopted after the act authorizing the issue of the securities, and where nothing on the face of the bonds indicated that they were illegal. The distinction pointed out by the foregoing statement not only illustrates the correctness of the decision in *Otis v. Cullum*, but also demonstrates the error of attempting to extend it to the state of facts presented in the case under consideration. Indeed, in examining and applying *Otis v. Cullum* the fact that it does not control a case like this has been recognized. (Daniel,

Neg. Inst., § 734a; *Rogers v. Walsh*, *supra*; *Cincinnati, New Orleans, etc., Railway v. Citizens' National Bank*, 24 Week. Law Bull. [Ohio], 198, 211.)

The foregoing analysis of the principles and review of the authorities governing the law of sale of negotiable paper, transferred without recourse, as between vendor and vendee, clearly demonstrates the unsoundness of the positions upon which the defendant in error relies, since it affirmatively establishes that there is no peculiar warranty, in a sale of commercial paper, and that the reasoning by which it is attempted to prove its existence is a mere misconception of the principles of the common law relating to the sale of goods and chattels.

In passing, however, it is worthy of note that whilst the civil law enforces in the contract of sale generally the broadest obligation of warranty, it has so narrowed it, when dealing with credits and incorporeal rights, as to confine it to the title of the seller and to the existence of the credit sold, and, *e converso*, the common law, which restricts warranty within a narrow compass, virtually imposes the same duty by broadening the warranty as regards personal property so as to impose the obligation on the vendor to deliver the thing sold as a condition of the principal contract or by implication of warranty as to the identity of the thing sold. By these processes of reasoning the two great systems, whilst apparently divergent in principle practically work substantially to the same salutary conclusions.

There are many questions discussed in the brief of counsel which we do not notice, and which we content ourselves with saying are without merit. The views above stated are controlling and decisive of the case and lead necessarily to the reversal of the judgment. As the case was heard upon a stipulation waiving a jury and upon an agreed statement of facts, it is our duty, in reversing, to direct that the proper judgment be entered below. (*Fort Scott v. Hickman*, 112 U. S. 150, and cases there cited.)

It follows that —

The judgment of the Circuit Court must be reversed, and the case be remanded with directions to enter judgment for plaintiffs for eight thousand three hundred and eighty-three dollars and seventy-five cents (\$8,383.75), with interest from judicial demand and costs.

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## § 115

## CHALLISS v. McCURM.

22 KANSAS, 157. — 1879.

ACTION to recover damages upon an implied warranty in the sale of certain notes. Demurrer to the petition overruled. Defendant appeals.

The opinion of the court was delivered by —

BREWER, J.— On December 4, 1871, plaintiff in error loaned one Edward A. Ege \$250, and took his note therefor in the sum of \$265, payable to Richard Probasco or bearer, and secured by mortgage. Long after its maturity, and in 1876, several payments having been made thereon in the meantime, plaintiff in error sold the note for its then face value to defendant in error. At the time of such sale he indorsed it, "Without recourse.— W. L. Challiss." McCrum sued on the note. Ege pleaded usury. The plea was sustained, and McCrum recovered \$229.90, less than the face value of the note, for which sum he brought this action. A demurrer to the petition was overruled, and this ruling is now presented for review.

Can the action be sustained? Of course no action will lie on the indorsement, for by his written contract Challiss expressly declines to assume the liabilities of an indorser. If sustainable at all, it must be as against him as a vendor, and not as an indorser, and upon the doctrine of an implied warranty. The theory of the defendant in error is, that every vendor of a bill, bond or note impliedly warrants that it is what it purports on its face to be — the legal obligation of the parties whose names appear on the instrument; and that the character of the indorsement or the lack of an indorsement in no manner affects this implied warranty. On the other hand, the counsel for plaintiff in error lays down the broad proposition that "there is no such thing as implied warranty in the sale of chattels;" and that, in the absence of express warranty, the maxim *caveat emptor* is of universal application. It is clear that the character of the indorsement cuts no figure in the question; as stated, no action will lie on it. But further, the restriction is only as to his liability as indorser, and in no manner affects his relation to the paper as vendor. An unqualified indorsement is the assumption of a conditional liability. The indorser becomes a new drawer, and is liable on the default of the drawee. "Without recourse," does away with this conditional liability. It leaves the indorsement simply as a transfer of title, and the indorser liable only as vendor; yet it leaves him a vendor, and divests him of none of the liabilities of a vendor. It makes the transaction the equivalent of a delivery of paper payable to bearer, and transferable by delivery. (*Hannum v. Richardson*, 48 Vt. 508.)

Independent, therefore, of any matter of indorsement, what implied warranty is there in the transfer of a promissory note? Two things are clear under the authorities: First, that there is an implied warranty of the genuineness of the signatures; and, second, that there is no warranty of the solvency of the parties. It is unnecessary to more than refer to a few of the authorities upon these propositions: (Byles on Bills, pp. 123, 125, and cases in notes; *Jones v. Ryde*, 5 Taunt. 488; *Gurney v. Womersley*, 4 El. & Bl. 132; *Gompertz v.*

*Bartlett*, 24 Eng. Law and Eq. 156; *Terry v. Bissell*, 26 Conn. 23; *Merriam v. Wolcott*, 3 Allen, 259; *Aldrich v. Jackson*, 5 R. I. 218; *Lobdell v. Baker*, 3 Metc. 469; 1 Addison on Cont., p. 152; *Ellis v. Wild*, 6 Mass. 321; *Eagle Bank v. Smith*, 5 Conn. 71; *Shaver v. Ehle*, 16 Johns. 201; *Dumont v. Williamson*, 18 Ohio St. 515; 2 Parsons on Notes and Bills, ch. 2, § 2.) But in the case at bar, the signature of the maker was genuine. The objection is, that it was never his legal obligation to the full amount for which it purported to be. How far is there any implied warranty in this respect? A reference to some of the leading cases will throw light upon this question.

In *Thrall v. Newell* (19 Vt. 203), it appeared that one of the makers of a note was insane. The vendor made a written assignment, in which was a description of the note, and the court construed this as an express warranty that the instrument was the legal obligation of the apparent makers, and one being incapable of contracting, gave judgment against the vendor on account of this breach for the amount received by him. While the judgment of the court is rested upon the fact of an express warranty, the judge who writes the opinion expresses his individual conviction that the same result would follow on a mere transfer without any express warranty, and quotes approvingly an extract from Rand's edition of Long on Sales, that "there is an implied warranty in every sale that the thing sold is that for which it was sold."

In *Lobdell v. Baker* (3 Metc. 469), it appeared that the owner of a note procured the indorsement of a minor, and then put the paper in circulation. He was held liable to a subsequent holder. Chief Justice Shaw, delivering the opinion of the court, says:

"Whoever takes a negotiable security is understood to ascertain for himself the ability of the contracting parties, but he has a right to believe, without inquiring, that he has the legal obligation of the contracting parties appearing on the bill or note. Unexplained, the purchaser of such a note has a right to believe, upon the faith of the security itself, that it is indorsed by one capable of binding himself by the contract which an indorsement by law imports."

In *Hannum v. Richardson* (48 Vt. 508), a note was given for liquor sold in violation of law, and was by statute void. Defendant knew its invalidity, transferred it by an indorsement without recourse, and he was held liable to his vendee.

In *Delaware Bank v. Jarvis* (20 N. Y. 226), a usurious note was sold, and the vendor was adjudged liable, not merely for the money received by him, but also the costs paid by his vendee in a suit against the makers of the note. In the opinion, Mr. Justice Comstock uses this language:

"The authorities state the doctrine in general terms that the vendor of a chose in action, in the absence of express stipulation,

impliedly warrants its legal soundness and validity. In peculiar circumstances and relations, the law may not impute to him an engagement of this sort. But if there are exceptions, they certainly do not exist where the invalidity of the debt or security sold arises out of the vendor's own dealing with or relation to it. In this case, the defendant held a promissory note which was void, because he had himself taken it in violation of the statutes of usury. When he sold the note to the plaintiffs and received the cash therefor, by that very act he affirmed in judgment of law that the instrument was unattainted so far at least as he had been connected with its origin."<sup>2</sup>

In *Young v. Cole* (3 Bingham N. C. 724), certain bonds were sold as Guatemala bonds, which turned out afterward to be lacking the requisite seal, and the vendor, though ignorant of the defect and innocent of wrong, was compelled to refund the money. The thing in fact sold was not the thing supposed and intended to be sold.

In *Gompertz v. Bartlett* (24 Eng. Law and Eq. 156), the plaintiff discounted for the defendant an unstamped bill, purporting on its face to have been a foreign bill, drawn at Sierre Leone and accepted in London, but which was in fact drawn in London. If actually a foreign bill, it required no stamp, and was valid; but being an inland bill, it required a stamp to make it a valid bill in a court of law. The acceptance was genuine, and the acceptor had previously paid similar bills. But the acceptor becoming bankrupt the commissioner refused to allow it against his estate because not stamped. Thereupon the plaintiff, who had sold the bill and been compelled to take it up, brought his action to recover the price he had paid for it, and the action was sustained. Lord Campbell, before whom the case had been tried, and who then held adversely to the plaintiff, said:

"I then thought that the rule *caveat emptor* applied; but after hearing the argument and the authorities cited, I think the action is maintainable, and upon this ground: That the article sold did not answer the description under which it was sold. If it had been a foreign bill, and there had been any secret defect, the risk would have been that of the purchaser; but here it must be taken that the

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<sup>2</sup> "The defendant in the case cited [*Marvin v. Jarvis*] had knowledge of the usury, which was not the fact here, and hence it differs from the case at bar, and is not decisive of the question. . . . The law in regard to the transfer of negotiable bills of exchange and promissory notes, as laid down for a century or more, only excepts two cases as coming within the doctrine of an implied warranty, viz., a warranty of title, and that the instrument is genuine and not forged. There is no precedent and not a single reported case in the books in favor of the doctrine that where a promissory note is infected with usury, and that fact is unknown to the party who transferred it, that is an implied warranty of the validity of the note." — *Littauer v. Goldman*, 72 N. Y. 506. See criticism of *Littauer v. Goldman*, in *Meyer v. Richards*, 163 U. S. 385, 411, and *Wood v. Sheldon*, 42 N. J. L. 421, 424. — H. [But see Mr. Crawford's approval of *Littauer v. Goldman*, in note 1, ante, p. 425. — C.]

bill was sold as and for that which it purported to be. On the face of the bill it purported to be drawn at Sierre Leone, and it was sold as answering the description of that which on its face it purported to be. That amounted to a warranty that it really was of that description."

In *Ticonic Bank v. Smiley* (27 Me. 225), an overdue note was transferred with this indorsement, "Indorser not holden;" yet it was decided that the indorser was liable to his vendee for any payment made on the note before the transfer, or any set-off existing against it of which the note gave no indication and the vendor no information.

In *Snyder v. Reno* (38 Iowa, 329), it was held that there is an implied warranty that there has been no material alteration in the paper since its execution. The court says: "We have no doubt that there is an implied warranty of the transferer that there is no defect in the instrument, as well as that the signature of the maker is genuine." (See also, *Blethen v. Lovering*, 58 Me. 437; *Ogden v. Blydenburgh*, 1 Hilton, 182; *Fake v. Smith*, 2 Abb. [N. Y.] App. 76; 2 Parsons on Notes and Bills, ch. 2, § 2, and cases in notes; *Terry v. Bissell*, 26 Conn. 23; 1 Daniel on Neg. Inst., § 670.)

In this, the author thus states the law:

"When the indorsement is *without recourse*, the indorser specially declines to assume any responsibility as a party to the bill or note; but by the very act of transferring it, he engages that it is what it purports to be — the valid obligation of those whose names are upon it. He is like a drawer who draws without recourse; but who is, nevertheless, liable if he draws upon a fictitious party, or one without funds. And, therefore, the holder may recover against the indorser *without recourse*, (1) if any of the prior signatures were not genuine; or, (2) if the note was invalid between the original parties, because of the want, or illegality of, the consideration; or, (3) if any prior party was incompetent; or, (4) the indorser was without title."

These authorities fully sustain the ruling of the district court. The note was not the legal obligation of the maker to the full amount. As to the usurious portion, it was as it were no note. This was a defect in the very inception of the note. It was known to the vendor and arose out of his own dealings in the matter.<sup>3</sup> By all these authorities there is an implied warranty against such a defect, and the vendor is liable for a breach thereof.

The suggestion of counsel that the change in the usury law, by the legislation of 1872, affected the right of recovery upon the note, has been already decided adversely, in the case of *Jenness v. Cutler* (12 Kas. 500).

All the justices concurring. Judgment affirmed.

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<sup>3</sup> It will be observed that this brings the case within subd. 4 of § 115. — H.

## § 115

HANNUM *v.* RICHARDSON.

48 VERMONT, 508. — 1875.

ASSUMPSIT for false warranty in sale of a promissory note. The note was made by Lincoln payable to McIntosh, for an illegal consideration rendering it void by statute; was indorsed without recourse by McIntosh to defendant and without recourse by defendant to plaintiff. Judgment for plaintiff.

The opinion of the court was delivered by

PIERPONT, CH. J.—It may be observed in the outset, that this action is not brought by the plaintiff as the indorsee of the note referred to against the defendant as the indorser, and the action is not based upon the indorsement, but is brought upon an alleged warranty by the defendant that the note was a valid and binding note, based upon a valid and lawful consideration, when in fact it was given for an illegal consideration, and was at its inception void. On trial the plaintiff introduced evidence in support of his declaration. After the evidence was in, the defendant insisted that as it appeared from the note that it was indorsed by the defendant “without recourse,” the legal effect of the indorsement could not be varied or controlled by evidence outside of the indorsement itself—that the same was conclusive in that respect; but the court held that such indorsement was not of itself conclusive of its legal effect in such sense as to exclude the evidence *aliunde*; and submitted the case to the jury in accordance with such ruling, and it is upon this decision and the charge of the court in respect to it, that the only question that has been raised and discussed by the defendant’s counsel arises.

What would have been the effect of this objection if the action had been based upon the indorsement, it is not necessary now to inquire. By indorsing the note “without recourse,” the defendant refused to assume the responsibility and liability which the law attaches to an unqualified indorsement, so that in respect to such liability, it may perhaps be regarded as standing without an indorsement. If it be so regarded, then in what position do these parties stand in respect to the transaction? The principle is well settled, that where personal property of any kind is sold, there is on the part of the seller an implied warranty that he has title to the property, and that it is what it purports to be, and is that for which it was sold, as understood by the parties at the time; and in such case, knowledge on the part of the seller is not necessary to his liability. The implied warranty is, in this respect, like an express warranty, the *scienter* need not be alleged or proved. Edwards, in his work on Bills and Promissory Notes (p. 188), says: “One who transfers a negotiable instrument by delivery or by indorsement, impliedly guarantees that it is genuine, and that he has title to it. The rule is the same in

regard to personal property. The vendor of a chattel always gives an implied warranty of the title. (15 Johns. 240; 6 Cow. 484; 4 Duer [N. Y.] 191; 6 Johns. 5.) Though the indorser transfers the note upon condition that it is to be collected at the risk of the indorsee, he is, nevertheless, responsible if the note proves to be a forgery." (Edwards, 289.)

In this case the note in question was given for intoxicating liquor sold in this state in violation of law, and therefore was void at its inception; in short, it was not a note, it was not what it purported to be, or what it was sold and purchased for; it is of no more effect than if it had been a blank piece of paper for which the plaintiff had paid his fifty dollars. In this view of the case we think the defendant is liable upon a warranty that the thing sold was a valid note of hand.

The plaintiff has declared as upon an express warranty. If he could prove one, very well; if he could not, the implied warranty is just as available to him, the declaration being according to its legal effect.

This view of the case relieves it from all embarrassment growing out of the question as to the admissibility of parol testimony to vary the indorsement, as the effect of the indorsement is really not involved in the case. And the ruling and charge of the court were really more favorable to the defendant than he had the right to ask.

The exceptions to the overruling of the motion in arrest were waived. The exceptions to the refusal to set aside the verdict as against the evidence, this court refuses to hear, the decision of the County Court being conclusive in such cases.

Judgment affirmed.<sup>4</sup>

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## 2. TITLE OF SELLER.

### § 115 WILLIAMS v. TISHOMINGO SAVINGS INSTITUTION.

57 MISSISSIPPI, 633. — 1880.

GEORGE, C. J., delivered the opinion of the court.

The appellants, having indorsed to the appellee a bill of exchange, to which they claimed title through a forged indorsement, now insist that they incurred no responsibility by their indorsement, except a guaranty that the drawee would pay it on presentation. But the rule is well settled that an indorser warrants the genuineness of the prior indorsements on the bill, and also his title to the paper. Should it be ascertained, even after payment of the bill, that any of the

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<sup>4</sup> Where the state constitution forbids the enforcement of any debt the consideration of which was a slave, the indorser of a note is nevertheless liable on his indorsement, although the original consideration between the maker and the payee was a slave. *Graham v. Maguire*, 39 Ga. 531. — H.



indorsements are forged, the drawee can recover back the amount of the bill from the person to whom he paid it; and so each preceding indorser may recover from the person who indorsed the bill to him. The drawee is bound to know the signature of the drawer, but not of the indorser. The judgment, which is in accordance with these views, is

Affirmed.<sup>5</sup>

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### 3. CAPACITY OF PRIOR PARTIES.

#### § 115

#### ERWIN *v.* DOWNS.

15 NEW YORK, 575. — 1857.

ACTION against indorser of notes signed by a firm of married women, and indorsed by defendant for their accommodation. Plaintiff took the notes with knowledge that the makers were married women. Judgment for plaintiff.

SHANKLAND, J.—The note was void, as against the makers, because they were married women, and incapable of contracting obligations in that form. But when the defendant indorsed the note, he impliedly contracted that the makers were competent to contract, and had legally contracted, the obligation of joint makers of the note. He also assumed the legal obligation, in most respects, of the drawers of the bill. The fact, known to the plaintiff at the time he took the note, that the makers were married women, did not deprive him of the character of a *bona fide* purchaser. Nor does the payee's knowledge that the drawee is a married woman, discharge the drawer in case of non-payment of the bill by the drawee. Nor is the indorser discharged, though the name of the maker is forged. (1 Comst. 113.) The fact is not found that the plaintiff was aware the note was accommodation paper. The plaintiff was a *bona fide* purchaser within the law merchant. Neither the complaint, nor the finding of the referee, tell us who transferred the notes to the plaintiff. The legal presumption is, that he received them from some legal holder in due course of business.

The judgment should be affirmed.

BROWN, J., delivered an opinion to the same effect.

All the other judges concurring.

Judgment affirmed.

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<sup>5</sup> Accord: *State Bank v. Fearing*, 16 Pick. (Mass.) 533. — H.

## 4. KNOWLEDGE OF INVALIDITY OR VALUELESSNESS.

§ 115

## BROWN v. MONTGOMERY.

20 NEW YORK, 287. — 1859.

ACTION on a note. Defense, fraud. Plaintiffs sold defendants a post-dated check drawn by Farnham & Co. to the order of L. R. Farnham, one of the firm, and by him indorsed. On the day of the sale plaintiffs employed Cutting, a bill broker, to sell the check. Cutting offered it to one Chard, who declined it on the ground that he held one drawn and indorsed by the same parties which had just been protested for non-payment. Cutting then sold it to defendants without disclosing the conversation with Chard. The drawers were, unknown to defendants, insolvent. The note in suit was given for the purchase price of the check.

The court charged the jury that the non-payment and protest of the check, on the 11th April, was evidence tending to show insolvency in the drawers; that it was the duty of Cutting to communicate to the defendants what he had heard Chard say about the protest of that check, without regard to what he may have thought about the solvency of the drawers; and if he did not do so, and they were really insolvent, the plaintiffs could not recover on the note. The plaintiffs' counsel excepted to both branches of the charge. There was a verdict and judgment for the defendants, which was affirmed at a general term. The plaintiff appealed.

DENIO, J.—I think there was no error in the charge to the jury in the Superior Court. The law unquestionably is, as it was assumed on the argument, that notice to the plaintiffs' agent, Cutting, while he was actually engaged in attempting to sell the check, of the failure of the drawers, was equivalent, so far as the present action is concerned, to notice to the plaintiffs themselves.

What Chard informed him, was not precisely that Farnham & Co. had failed, but that their check on the bank at which they kept their account was that day protested for non-payment. This, *prima facie*, was notice that they had suspended payment; for when a business man in a commercial town fails to meet his paper, payable at a bank, and especially his checks upon the bank at which he keeps his account, the natural inference which every one draws is, that he is no longer able to pay his debts. Such a circumstance may occur from oversight or accident, but those are exceptional cases. The failure to meet the paper is itself a suspension of payment, and notice of such a fact, unaccompanied with any explanation which would give it a different character, is notice of the commercial failure of the party. That it was so understood by Cutting and Chard is evident from the fact that they speculated upon the question, whether

the members of the firm drawing the check would ultimately be able to pay. Upon that question, Chard, as a creditor is apt to do, took the most favorable view. It is apparent that neither of them expected the check to be paid on presentation when it should mature, five days afterwards. The Superior Court considered that the confidence which Chard expressed in the ultimate solvency of the members of the firm, did not relieve Cutting from the duty of communicating to the defendants the fact that its check had not been met. I am of the same opinion. Up to that time the drawers were in good credit, and their paper of this kind, we are to presume, was promptly met. Thereafter, the holders of such paper were to be put upon their legal diligence in the courts, with a fair expectation, perhaps, that they might ultimately be able to obtain payment. The difference between a bank check having five days to run, and which is then to be paid, and a suspended debt against parties who have failed, is sufficiently obvious. The defendants purchased this check as one of the former class, while the plaintiffs' agent well knew that it belonged to the latter, and withheld that knowledge from the defendants. The plaintiffs' conduct is less censurable, morally, than it would be had it been proved that they personally knew of the failure of the drawers; but in point of law, the case is the same as though, after hearing that Farnham & Co. had failed, they took the paper which they held against them into the street, and sold it to parties who had not heard of that event. Such an act could not be justified at law any more than in the forum of conscience.

The judge was therefore perfectly correct in instructing the jury that it was the duty of Cutting to communicate to the defendants what he had heard Chard say as to the protest of the other check. He was also correct in advising them that the consequences of omitting to do so was that the plaintiffs could not recover on the note. Where a party negotiates commercial paper, payable to bearer, or under the blank indorsement of another person, he cannot be sued on the paper because he is not a party to it; but he nevertheless warrants that he has no knowledge of any facts which prove the paper to be worthless, on account of the failure of the makers, or by its being already paid, or otherwise to have become void or defunct; for, says Judge Story, any concealment of this nature would be a manifest fraud. (Story on Prom. Notes, § 118.)

The plaintiff's counsel argued that, according to the case of *Nichols v. Pinner* (18 N. Y. 295), the plaintiffs and their agent were warranted in maintaining silence as to the failure of Farnham & Co., though they knew it and the defendants did not. But the cases are essentially different. There we decided, that where a merchant, knowing himself to be insolvent, purchases goods without disclosing the fact, there being no inquiry made, he is not necessarily guilty of fraud, as he may honestly believe that he can go on and retrieve

his affairs. Where so much of the trade of the country is conducted without invested capital, or on borrowed capital, it must often happen that a merchant who is ultimately successful has known periods of commercial disaster when his property would not pay his debts. It would be too strict to hold, that under such circumstances he must in all cases go into liquidation, or expose himself to probably bankruptcy by disclosing his condition. But the case does not countenance the position, that a dealer who has been of known standing, but who has suddenly failed in business, can go to those who were acquainted with his former character, but who have not heard of his failure, and innocently purchase their property on credit. Judge Selden, in his opinion, puts that case as one not covered by the judgment.

The judge was also right in stating to the jury, that the non-payment of the check, spoken of by Chard, was evidence upon the question of the insolvency of the drawers. I have already stated what I consider the necessary inference from such a circumstance among business men. The judgment must be affirmed.

JOHNSON, CH. J., COMSTOCK, GRAY, and GROVER, JJ., concurring.  
Judgment affirmed.<sup>6</sup>

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#### 5. INDORSER: INSTRUMENT VALID AND SUBSISTING.

### § 116

### HOROWITZ v. WOLLOWITZ.

59 MISCELLANEOUS (N. Y. SUP. CT., APP. T.) 520. — 1908.

GIEGERICH, J. The complaint alleges that on the 28th day of December, 1906, the defendant Barnet Cohen made and delivered to the defendant Jacob Jormack his promissory note, in form as follows:

"\$500.00

Dec. 28, 1906.

"Six months and five days after date I promise to pay to the order of myself five hundred dollars at 16½ Carmine St.

"Value received.

B. COHEN."

— and that at the time of making said note, and prior to its delivery to the plaintiff, the defendant Louis Wollowitz indorsed it, for the purpose of giving credit thereto with the defendant Jormack, and with the intent to charge himself as first indorser. It is further alleged that thereafter and before maturity the defendant Jormack indorsed the note to the plaintiff, who on the credit of the prior indorsements, gave value therefor. Then follow appropriate allegations of presentment, nonpayment, protest, and notice. The answer, among

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<sup>6</sup> Cited with approval in *Rothmiller v. Stein*, 143 N. Y. p. 592. But the seller is not bound to disclose that the instrument is accommodation paper drawn by a clerk and accepted by the accommodated party. *People's Bank v. Bogart*, 81 N. Y. 101. — H.

other things, sets up that Jormack exacted and received usury from Cohen, the maker of the note, and that the defendant signed his name to said note after such usurious agreement had been consummated and executed between Jormack and Cohen, and that the note was tainted with usury in its inception, and never had any legal and valid inception, and was void for usury. \* \* \*

At the close of the plaintiff's case a concession was made that there was usury in the inception of the note between Cohen and Jormack. The defendant put in no evidence, but moved to dismiss the complaint on the ground that it affirmatively appeared that the note was void in its inception. The court reserved decision, and subsequently rendered judgment in favor of the defendant. \* \* \*

On behalf of the appellant it is claimed that section 96 of the Negotiable Instruments Law (Laws 1897, c. 612, p. 732) has entirely swept away the defense of usury as against holders in due course, citing *Schlesinger v. Kelly*, 114 App. Div. 546; *Wirt v. Stubblefield*, 17 App. Cas. D. C. 284; *Broadway Trust Co. v. Mannheim*, 47 Misc. Rep. 415, and the concurring memorandum of Mr. Justice Willard Bartlett in *Schlesinger v. Gilhooly*, 189 N. Y. 1, at page 34.<sup>7</sup>

It is not necessary in the present case, however, to pass upon the question of the availability to the maker of a note of the defense of usury as against holders in due course, because the liability involved in this appeal is that of an indorser, not of the maker, and the liability of an indorser is dealt with in other portions of the act; section 116 providing:

"That every indorser who indorses without qualification warrants to all subsequent holders in due course: \* \* \* (2) That the instrument is at the time of his indorsement valid and subsisting."

In *Packard v. Windholz*, 88 App. Div. 365, one Truman made his promissory note to one Eaton, and then forged Eaton's indorsement, and next procured the defendant Windholz to indorse it. The note with these two indorsements upon it, was presented to the plaintiffs, who were note brokers; and by them was negotiated for the benefit of Truman. The defendant and those subsequent to him believed the indorsement of Eaton was genuine, and the plaintiffs learned he was responsible. The Appellate Division sustained the judgment in favor of the plaintiffs, holding that the defendant by his contract of indorsement guaranteed the genuineness of the signature of Eaton, the prior indorser on the note, and that the note was a valid and subsisting obligation, citing section 116 of the Negotiable Instruments Law. This ruling was upheld by the Court of Appeals without opinion. 180 N. Y. 549.

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<sup>7</sup> See *Schlesinger v. Lehmaier*, 191 N. Y. 69, *ante*, p. 378, and *Klar v. Kostiuik*, 65 Misc. 199, *ante*, note 7, p. 380. — C.

In *Lennon v. Grauer*, 159 N. Y. 433, it was held that the fact that the name of the maker of a note was forged did not discharge the indorser; the ground of the decision being that the indorsement of a promissory note implies a contract by the indorser with a subsequent *bona fide* holder that the instrument itself and all the signatures prior to the particular indorsement are genuine.

Under the language of the statute, as applied by the above decisions, it must be held that in indorsing the note the defendant warranted its validity, and that he cannot be heard now to assert that it is void for usury, any more than for forgery or any other cause. Furthermore, apart from the provisions of section 116, it is an established rule that the obligation of an indorser is a new and independent contract, separate and distinct from the contract evidenced by the note. 4 Am. & Eng. Ency. L. (2d Ed.) p. 477, and cases cited; *Morford v. Davis*, 28 N. Y. 481; *Donohoe v. Meeker*, 35 App. Div. 43.

The judgment should be reversed, and a new trial ordered, with costs to appellant to abide the event. All concur.<sup>8</sup>

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## § 116 UNITED STATES v. AMERICAN EXCHANGE NATIONAL BANK.

70 FEDERAL REPORTER (DIST. CT., S. D., N. Y.) 232. — 1895.

ACTION to recover the amount of a pension draft which defendant had collected, as collecting agent of another bank; it appearing that the name of the payee had been forged upon the draft after her death. The court directed a verdict for defendant, and plaintiff moved for a new trial.

BROWN, D. J. The pension draft in this case was paid to the defendant bank by the subtreasury, upon the forged indorsement of the payee's name after her death. The Bellaire Bank of Ohio had previously cashed the draft upon the forged indorsement, and thereupon indorsed it "for collection" to the defendant bank at New York. The latter was the collecting correspondent of the Bellaire Bank as regards its funds in New York. The collection was made in good faith by the defendant bank and the proceeds remitted to the Bellaire Bank some months before the discovery of the forgery. The indorsement of the forged draft by the Bellaire Bank showed upon its face that the defendant was to act as collecting agent only. The defendant

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<sup>8</sup> Indorsement admits the signature and capacity of every prior party. *Prescott Bank v. Caverly*, 7 Gray, 217. This includes the existence and capacity of a firm, *Dalrymple v. Hillenbrand*, 62 N. Y. 5; or of a corporation, *Glidden v. Chamberlin*, 167 Mass. 486, 494; or of a married woman, *Edmunds v. Ross*, 51 N. J. L. 547. See *Hannum v. Richardson*, 48 Vt. 508, *ante*, p. 432. — H.

never had any property in the draft or its proceeds. The later authorities sustain the proposition that in such a case where the collecting agent pays over the funds before any notice of irregularity or fraud, the remedy is against the principal alone. *Bank v. Armstrong*, 148 U. S. 50; *White v. Bank*, 102 U. S. 685; *Sweeny v. Easter*, 1 Wall. 166; *Wells, Fargo & Co. v. U. S.*, 45 Fed. 337; *National Park Bank v. Seaboard Bank*, 114 N. Y. 28.

In such cases the indorsement by the collecting agent, who has no proprietary interest, does not import any guaranty of the genuineness of all prior indorsements, but only of the agent's relation to the principal, as stated upon the face of the draft; and as this relation is evident upon the draft itself, the payor cannot claim to have been misled by the indorsement of the agent, or any right to rely upon that indorsement as a guaranty of the genuineness of the payee's indorsement.

In the case of *Onondaga Co. Sav. Bk.* (64 Fed. 703), as I find upon examination of the record on appeal, no question like the present arose. The Onondaga Bank was in the same situation as the Bellaire Bank in the present case. It had cashed the forged draft and was collecting the money for its own benefit as owner of the draft. Its indorsement imported a guaranty of the prior signatures; and the defendant's remedy here is against the Bellaire Bank.

The direction of a verdict for the defendant upon the undisputed facts was, I think, correct, and the motion for a new trial should be denied.<sup>9</sup>

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<sup>9</sup> Mr. Crawford says that the doctrine of this case has been changed by the Negotiable Instruments Law. In commenting upon § 116 on page 89 of the 3rd edition of his work on this statute, he says: "As this and the preceding section include the case of every indorser, the warranty as to genuineness will apply to one to whom the paper has been indorsed restrictively, as, for example, where the indorsement is 'for collection.' This undoubtedly changes the law; for the former rule was that the indorsement of a bank to which paper had been indorsed 'for collection' did not import a guaranty of the genuineness of all prior indorsements, but only of the agent's relation to the principal as stated upon the face of the paper; and it was held that, in such a case, the collecting bank was not liable after it had paid the proceeds to its principal, though a prior indorsement was a forgery. *United States v. American Exchange Nat. Bank*, 70 Fed. 232; *Nat. Park Bank v. Seaboard Nat. Bank*, 114 N. Y. 28. But this rule was exceedingly inconvenient in practice, and hence it was deemed expedient to make every indorser a warrantor of genuineness. There is no hardship in this rule, for each indorser has a right of recourse against all prior parties. The former rule, however, introduced such an element of uncertainty that the clearing house associations throughout the country adopted rules to obviate its effects, and the bankers sent letters to their customers requesting that they discontinue the use of the indorsement 'for deposit,' 'for collection,' etc. In this, as in several other instances where the law was changed, the needs of the business community were deemed of more importance than technical principles."

For a statement of the action of the clearing house associations, referred to above by Mr. Crawford, see also *First Nat. Bank of Belmont v. First Nat. Bank of Barnesville*, 58 Oh. St. 207, at p. 214. — C.

## 6. LIABILITY OF AGENT AS SELLER.

§ 119

WORTHINGTON *v.* COWLES.

112 MASSACHUSETTS, 30. — 1873.

ACTION to recover back money paid by plaintiff to defendants for a promissory note signed by one Hanson, the indorsement upon which was forged. Defendants were note-brokers, who sold the note for Hanson, and paid him the purchase money, less commissions, before the forgery was discovered. Judgment for plaintiff. Defendants allege exceptions.

MORTON, J. — This is an action of contract upon the implied warranty of the genuineness of the signature to a note sold by the defendants to the plaintiff. The plaintiff claimed that in the purchase of the note he dealt solely with the defendants, and upon their credit. The defendants claimed that they were acting as agents of Hanson in the transaction, and that their principal was disclosed to the plaintiff. Upon these points the evidence was conflicting. The defendants asked the court to rule “that if the defendants were in fact agents for Hanson, and disclosed their agency to the plaintiff, or the plaintiff knew it, or had reasonable cause to know it, the defendants would not be liable.”

Considered as an abstract proposition of law, this is too broad. It omits the necessary element that, in the dealing or transaction in question, they were acting as such agents. It may be true that the defendants were agents of Hanson, and known to be such by the plaintiff, and yet if, in the purchase of this note, it was understood by the parties that the plaintiff was dealing with and upon the credit of the defendants, they would be liable. An agent may deal so as to bind himself personally; it is always a question of the intention and understanding of the parties. The presiding judge properly refused to give the instructions in the form requested by the defendants. Instead thereof, he ruled in substance that the question was, from whom did the plaintiff understand that he was buying the note — from the brokers or from Hanson? and that if such a state of facts occurred, that the plaintiff understood, or ought to have understood as a man of reasonable intelligence, that he was dealing with Hanson, the defendants would not be liable.

These instructions were correct, as applied to the facts of the case. The plaintiff dealt with the defendants. His evidence tended to show that he contracted with them as principals. To meet this *prima facie* case, the defendants undertook to show that in this transaction they were dealing as agents of a disclosed principal. Unless from their disclosures or other sources the plaintiff understood, or ought as a reasonable man to have understood, that he was dealing with Hanson, he



had a right to assume that he was dealing with the defendants as principals. The instructions given were to this effect, and were as favorable to the defendants as the instructions requested, with the addition of the necessary qualification that the defendants were in this transaction dealing as the agents of Hanson. (*Wilder v. Cowles*, 100 Mass. 487; *Merriam v. Wolcott*, 3 Allen, 258.)

Exceptions overruled.<sup>1</sup>

## V. Indorser: secondary, conditional liability.

### 1. INDORSER'S CONTRACT AS SELLER.

[See preceding subdivision IV, pp. 419-442.]

### 2. INDORSER'S CONTRACT AS ASSURER OF PAYMENT.

#### § 116

#### LONG v. STEPHENSON.

72 NORTH CAROLINA, 569. — 1875.

ACTION against indorser. Plaintiff alleged that the drawee refused to accept or pay, and that defendant on demand also refused to pay. Defendant alleged non-presentment to drawee and want of notice of dishonor. Judgment for defendant.

SETTLE, J.—The authorities cited by the defendant's counsel establish beyond controversy:

1. That the draft should have been presented for payment.<sup>2</sup>

2. That notice of non-payment should have been given in reasonable time to the defendant.<sup>3</sup>

As both of these essential requisites to the maintenance of this action are wanting, we concur with his honor that the plaintiff is not entitled to recover.

Judgment affirmed.<sup>4</sup>

<sup>1</sup> Accord: *Meriden National Bank v. Gallaudet*, 120 N. Y. 298; *Brown v. Ames*, 59 Minn. 476; Huffcut on Agency, § 186. — H.

<sup>2</sup> *Post*, Art. VII. — H.

<sup>3</sup> *Post*, Art. VIII. As to protest as a third requisite, see Art. XIII, *post*. — H.

<sup>4</sup> "The liability of the indorser is strictly conditional, dependent both upon due demand of payment upon the maker or acceptor, and also due and legal notice of the non-payment. The purpose and object of such demand and notice is to enable the indorser to look to his own interest, and take immediate measures for his indemnity. The demand and notice being conditions precedent to the indorser's liability, it is incumbent on the holder to make clear and satisfactory proof of them before he can recover." *Lawson v. Farmers' Bank*, 1 Ohio St. 206.

"The indorser of a bill of exchange, whether payable after date or after sight, undertakes that the drawee will pay it, if the holder present it to him at maturity and demand payment; and if he refuse to pay it, and the holder

§ 117 BRUSH *v.* ADMINISTRATORS OF REEVES.

3 JOHNSON (N. Y.) 439. — 1808.

THE plaintiff declared on a promissory note, given by one Spring to Reeves, the intestate, and payable to him or bearer. The note was indorsed over by Reeves, and the present suit was brought by the indorsee against his administrators. There was a general demurrer to the declaration, which was in the usual form against the indorser.

PER CURIAM.—The note was negotiable under the statute, and transferable without indorsement; but if the payee chose to put his name on the back, he became as much bound as an indorser, as if the note had been made payable to him or order.

It was ruled by Chief Justice Holt, in the case of *The Bank of England v. Newman* (1 Lord Raym. 442), that if a person indorses a bill payable to bearer, he becomes a new security, and is liable on the indorsement. The declaration at least is good on a special demurrer. But the defendant may withdraw the demurrer, on payment of costs, and pleading forthwith.

Judgment for the plaintiff.<sup>5</sup>

§ 116 OOTHOUT *v.* BALLARD.

41 BARBOUR (N. Y.) 33. — 1864.

ACTION against indorsers on note due Nov. 29 (Saturday). Notice of dishonor received about 6 P. M. of that day. Service of summons and complaint in this action soon after on the same day. Judgment for plaintiff.

*By the Court*, MASON, J.—The only question presented in this case is whether a suit can be maintained against the indorsers of a note payable at a bank, and which has been duly protested, where the suit is commenced on the day of the protest, or the third day of grace. The rule in England, as understood by *Chitty*, is that the suit on the third day of grace is premature. (See *Chitty on Bills*, 406, 407, 409, 8th Lond. ed.) And such I understand to be the rule

cause it to be protested, and due notice to be given to the indorser, then he promises to pay it. All these conditions enter into and make part of the contract between these parties to a foreign bill of exchange; and the law imposes the performance of them upon the holder, as conditions precedent to the liability of the indorser of the bill." *Musson v. Lake*, 4 How. (U. S.) 262. — H.

[See *Rogers v. Detroit Sav. Bank*, 146 Mich. 639, reported in 18 L. N. S. 530, with note entitled "Release of indorser of note by failure to enforce liability of maker." — C.]

<sup>5</sup> See p. 447, note (2), *post.* — H.

held in Westminster Hall. (*Castrique v. Bernabo*, 6 Queen's B. R. 498; *Lifferty v. Mills*, 4 T. R. 170.) The rule is so understood by Byles. (See his late work on Bills, p. 181.) In this country there is certainly considerable conflict of authority over the question, in the courts of the different states. The courts of Maine, New Hampshire, Massachusetts, South Carolina, and some others, have held that the suit could be commenced on the third day of grace, at any time after the close of banking hours and proper protesting of the note. (1 Pick. 401; 21 *id.* 310; 8 *id.* 414; 1 Metcalf, 43, 48; 4 Greenl. Rep. 479; 7 N. Hamp. Rep. 199; 8 Foster, 302; 4 Humph. 241; 5 Shep. 230; 31 Maine Rep. 580; 40 *id.* 62; 15 *id.* 67; *Wilson v. Williamson*, 1 Nott & McCord, 440.) While on the other hand the courts of Pennsylvania, Ohio, Illinois, Mississippi, Alabama and some others have held the suit prematurely brought if commenced on the third day of grace. (*Thomas v. Shoemaker*, 6 Watts & Serg. 179; *Walter v. Kirk*, 14 Illinois Rep. 55; *Wiggle v. Thomason*, 11 Smedes & Marsh. 452; *Beavan v. Eldridge*, 2 Miles, 353; *Randolph v. Cook*, 2 Porter, 865; 5 Serg. & R. 318.)

The rule in this state has long been regarded as settled that the suit commenced on the third day of grace was prematurely brought. The question came before the Supreme Court in *Hogan v. Cuyler* (8 Cowen's Rep. 203), when it was held to be premature to commence the suit on the third day of grace. The question was distinctly presented again in *Osborn v. Moncure* (3 Wend. 170), when it was distinctly held the suit could not be maintained, when commenced on the third day of grace. Chief Justice Savage regarded the rule so well settled with us, in this state, that he held in *Hopping v. Quin* (12 Wend. 517), that where an attorney commenced a suit upon a note on the third day of grace and was beaten and then brought suit against his client to recover for his services, he was not entitled to recover; and in speaking upon this question he says: "It was the duty of the plaintiff to have known that a suit could not be brought on the last day of grace; and his bringing such a suit must be imputed either to negligence or ignorance. In either case it lays no foundation for an action against his client, who has been the sufferer." There is no case in the courts of this state to the contrary of these cases, while all the elementary books have treated our law in this state as settled in conformity to these cases. Judge Cowen so regarded it when he wrote his treatise. (1 Cowen's Tr. 220, ed. 1844), where he lays down the doctrine distinctly, that the suit cannot be maintained if commenced on the last day of grace. And so Edwards regards it in his treatise on Bills and Notes (see pages 525, 526, 527); and the rule in this state is so regarded by Parsons in his treatise. (See Vol. 1, page 440, and also note i.) Chief Justice Shaw regards our rule in this state as different from theirs. (1 Metcalf, 54.)

The rule in England seems to have conformed to a general practice — the practice to postpone notice of the dishonor and other proceedings, till the day following — so that it has been regarded amongst merchants as a right to have all of the last day of grace in which to pay. In *Hartley's case* (1 Carr. & P. 555), Abbott, Ch. J., on a motion to show cause, said, "I think the notice of dishonor given on the day on which the bill is payable, will be good or bad as the acceptor may or not afterwards pay the bill. If he does not afterwards pay, on that day the notice is good, and if he does it of course comes to nothing." And Byles, in his late valuable treatise on Bills. page 131, says: "The acceptor of a bill, whether inland or foreign, or the maker of a note, should pay it on demand made at any time within business hours on the day it falls due, and if it be not paid on such demand the holder may instantly treat it as dishonored. But," he adds, "the acceptor has the whole of that day within which to make payment, and though he should in the course of the day refuse payment, which entitles the holder to give notice of dishonor, yet if he subsequently on the same day makes payment it is good, and the notice of dishonor becomes of no avail." This is precisely as I understand the rule with us. Now if we admit that the courts of Massachusetts, Maine, New Hampshire, etc., have the better reason for their decisions, there is no such great principle involved in the case as would justify us in overruling our own cases and following theirs; especially so where we are supported by equal weight of authority on our side; and Parsons, who is an earnest advocate on the other side, admits that "there is strong reason for holding that a party bound to pay has the whole of the day of maturity." (Parsons on Notes and Bills, vol. 2, p. 460.) And our rule has certainly one advantage; it tends to uniformity in the law by conforming to the general rule with reference to all other contracts, which holds that when a day is appointed for the payment of money the payer has the whole of the day, down to the last moment, in which to tender the money.

It is proper to remark that none of the cases make any difference or distinction between the case of the maker or indorser. None can be made. As regards this question of the right to bring the suit, there is not and ought not to be any distinction between a note payable at bank and one payable at large, or at the counting house of the merchant; and none seems to have been recognized in this state. (2 Cowen, 766.) \* \* \*

New trial granted.

## 3. IRREGULAR INDORSER.

## § 114

## COULTER v. RICHMOND.\*

59 NEW YORK, 478. — 1875.

\* [The following note was in the first edition appended to the case of *Coulter v. Richmond*, 59 N. Y. 478, which is omitted in this edition. It will of course be observed that the note gives the law as it existed prior to the enactment of the Negotiable Instruments Law. — C.]

IRREGULAR INDORSER. There is a hopeless conflict of judicial authority as to the nature of the contract of the irregular indorser, *e. g.* where a negotiable instrument payable to A. is indorsed first by B., delivered to A., and then (perhaps) indorsed by A. and transferred to C. The matter is solved, *first*, by a presumption from the appearance of the paper, and, *second*, by parol evidence as to the time of B.'s indorsement or as to that and also as to the actual contract intended by the parties. The conflicting rules may be thus stated:

1. *Presumption that B. is an indorser.* (1) The presumption from the appearance of the paper is that B. is a second indorser. (a) Upon proof that the indorsement was made before delivery to the payee (A.), the irregular indorser (B.) is treated as the first unqualified indorser and is liable as such to the payee (unless he signed for the accommodation of the payee), and to subsequent parties. It is as if the payee (A.) indorses without recourse to the irregular indorser (B.), and the latter then indorses in blank to the payee. In theory, therefore, the payee (A.) is the first (qualified) indorser; the irregular indorser (B.) is the second (unqualified) indorser; and should the payee (A.) then indorse in blank he becomes the third (unqualified) indorser. It is a short cut to say that the irregular indorser is the first indorser, because he is the first unqualified indorser. *Moore v. Cross*, 19 N. Y. 227; *Wade v. Creighton*, 25 Ore. 455; *Blakeslee v. Hewett*, 76 Wis. 341. (b) Upon parol proof as above the same rule follows, but parol proof is further admissible to show the actual contract, as that the irregular indorser signed as maker or (if statute of frauds can be escaped), guarantor. *De Pauw v. Bank of Salem*, 126 Ind. 553; *Schafer v. Farmers', etc., Bank*, 59 Pa. St. 144; *Central N. B. v. Dreydoppel*, 134 Pa. St. 499; *Hayden v. Weldon*, 43 N. J. L. 128; *Neal v. Wilson*, 79 Ga. 736. (c) But if the instrument is non-negotiable, the irregular indorser is held to be a maker or guarantor. *Cromwell v. Hewitt*, 40 N. Y. 492; *First N. B. v. Babcock*, 94 Cal. 96; *Pool v. Anderson*, 116 Ind. 88; *Gorman v. Ketchum*, 33 Wis. 427.

(2) In Alabama it seems that the irregular indorser is treated as a regular first indorser. *Hooks v. Anderson*, 58 Ala. 238. See also *Yuen Lung v. Burke*, 9 Hawaiian Rep. 142.

(3) By statute in some jurisdictions the irregular indorser is treated as a regular indorser. Bills of Exchange Act (Eng.), § 56, and Chalmers's Notes, p. 188 *et seq.*; Dominion Bills of Exchange Act (Canada), § 56; California Code, § 3117, and see *Fessenden v. Summers*, 62 Cal. 484; Massachusetts St. of 1874, c. 404. In Massachusetts the original doctrine that the irregular indorser is liable as a co-maker (*Union Bank v. Willis*, 8 Met. 504), seems to be modified only to the extent of requiring that the irregular indorser have notice of dishonor. The irregular indorser in Massachusetts is therefore a co-maker with a right to notice of non-payment the same as an indorser. *Mulcaire v. Welch*, 160 Mass. 58; *Legg v. Vinal*, 165 Mass. 555; Connecticut Gen. St., § 1860, as construed in *Spencer v. Allerton*, 60 Conn. 410 (now governed by Neg. Inst. L.).

# § 114 ROCKFIELD v. FIRST NATIONAL BANK OF SPRINGFIELD.

77 OHIO STATE, 311. — 1907.

ACTION on note indorsed by defendants Rockfield, Snyder and others before delivery to plaintiff. Defendants answered that they were not notified of the nonpayment of the note by the maker at maturity. Plaintiff's demurrer to answer was sustained, and defendants not pleading further, judgment was rendered against them. Defendants bring error.

*II. Presumption that B. is a co-maker.* (1) The presumption from the appearance of the paper is that the irregular indorser (B.) is a co-maker. *Good v. Martin*, 95 U. S. 90; *Good v. Martin*, 1 Colo. 165; *Tabor v. Miles*, 15 Colo. App. 127; *McCallum v. Driggs*, 35 Fla. 277; *Bradford v. Prescott*, 85 Me. 482; *Schroeder v. Turner*, 68 Md. 506; *Gumz v. Giegling*, 108 Mich. 295; *Peninsular Bank v. Hosie*, 112 Mich. 351; *Dennis v. Jackson*, 57 Minn. 286; *Schultz v. Howard*, 63 Minn. 196; *Richardson v. Foster*, 73 Miss. 12; *Martin Bank v. Hammerslough*, 72 Mo. 274 (cf. *First Nat. Bk. v. Payne*, 111 Mo. 291); *Salisbury v. First N. B.*, 37 Neb. 872; *Sargent v. Robbins*, 19 N. H. 572; *McFetrich v. Woodrow*, 67 N. H. 174; *Hoffman v. Moore*, 82 N. Car. 313; *Ewan v. Brooks-Waterfield Co.*, 55 Oh. St. 596; *Jackson Bank v. Irons*, 18 R. I. 718; *Sylvester Bleckley Co. v. Alewine*, 48 S. Car. 308; *Provident, etc., Soc. v. Edmonds*, 95 Tenn. 53; *Barton v. American N. B.*, 8 Tex. Civ. App. 223; *Bank v. Dorset Marble Co.*, 61 Vt. 106; *Donohoe-Kelly Banking Co. v. Puget Sound Sav. Bank*, 13 Wash. 407. (a) Most of the above jurisdictions allow parol evidence to show the real contract. 1 Daniel on Neg. Inst., §§ 710-712. (b) A few states do not if in fact B. signed before delivery to the payee. *Dennis v. Jackson*, 57 Minn. 286.

(2) But if the paper is payable to the drawer's or maker's own order and indorsed by B. before negotiation, the irregular indorser is treated as a first indorser, the paper being put upon the same footing as paper payable to bearer. *Bigelow v. Colton*, 13 Gray (Mass.) 309; *Clapp v. Rice*, 13 Gray (Mass.) 403; *Dubois v. Mason*, 127 Mass. 37; *First N. B. v. Payne*, 111 Mo. 291; *Hately v. Pike*, 162 Ill. 241. See § 117 post. But see *National Bank v. Dorset Marble Co.*, 61 Vt. 106.

(3) In one or two states it seems immaterial that the payee actually indorses above the name of the irregular indorser. *Bank v. Dorset Marble Co.*, 61 Vt. 106; *McFetrich v. Woodrow*, 67 N. H. 174.

*III. Presumption that B. is a guarantor.* The presumption from the appearance of the paper is that the irregular indorser is a guarantor. *Blatchford v. Milliken*, 35 Ill. 438; *Kingsland v. Koeppe*, 137 Ill. 344; *Arnold v. Bryant*, 8 Bush (Ky.), 668 (by statute); *Conger v. Babbet*, 67 Iowa, 13 (by statute); *Fullerton v. Hill*, 48 Kans. 558. Parol evidence is admissible to show the actual contract. *Milligan v. Holbrook*, 168 Ill. 343. In some states the payee or holder may treat the irregular indorser either as a co-maker or surety as he may elect, but parol proof may show the true contract. *Orrick v. Colston*, 7 Gratt. (Va.) 189; *Roanoke, etc., Co. v. Watkins*, 41 W. Va. 787; *Miller v. Clendennin*, 42 W. Va. 416.

As to whether an irregular indorsement construed as a guaranty is within the statute of frauds, there is a conflict. That it is: *Culbertson v. Smith*, 52 Md. 628; *Hayden v. Weldon*, 43 N. J. L. 128; *Hauer v. Patterson*, 84 Pa. St. 274. That it is not: *Beckwith v. Angell*, 6 Conn. 315; *Stowell v. Raymond*, 83 Ill. 120; *Peterson v. Russell*, 62 Minn. 220. — H.

SPEAR, J. Whether or not the answer avers a defense to the cause of action set up in the petition is the question here. The theory of the defendants' pleading is that Rockfield and Snyder, by writing their names across the back of the note, became indorsers in the commercial sense, and therefore entitled to notice of demand at maturity of the maker and of nonpayment, and, failing that, no liability attached. The theory of the petition is that these defendants, having signed the note before delivery, must be held to have signed with the purpose of giving it credit and of aiding negotiability, and therefore stand as makers, and although their names appear on the back of the instrument, and they are in law sureties, yet they are not indorsers in the commercial sense, and therefore not entitled to notice of demand and nonpayment. This view is the one adopted by the trial court, which incorporated in the judgment entry a finding that the defendants are indebted as joint and several makers of the note, and this is the view taken of the question by the Circuit Court in affirming the judgment of the common pleas. Which is the correct view is the question we have.

That the conclusion adopted by the lower courts is in accord with the law as held in this state from early times, and with all decisions of this court thus far made, is conceded. The latest deliverance on the subject is the case of *Ewan v. Brooks-Waterfield Co.*, 55 Ohio St. 596, opinion by Williams, C. J. It is there held that where the name of a third party, a stranger to the note, appears in blank upon the back of the note at the time it takes effect, his undertaking rests upon the consideration which supports the note, and the presumption is that he intended to be liable as a surety, and he will be held accordingly unless it is shown that there was a different agreement between the parties. This conclusion is reached after a careful and somewhat extended review of authorities, many of them decisions of this court, and is supported by strong and convincing argument. While a contrary doctrine, holding such party to be an indorser in the commercial sense, had been held in a number of states, notably Alabama, California, Connecticut, Indiana, Mississippi, New York, Oregon, Pennsylvania, and Wisconsin, the Ohio rule, as above indicated, had been the settled common law rule of the states of Arkansas, Colorado, Delaware, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Hampshire, North Carolina, Rhode Island, South Carolina, Texas, Utah, and Vermont.

The statute referred to is the act of April 17, 1902, known as the Negotiable Instruments Act (95 Ohio Laws, p. 162), carried into the Revised Statutes of 1906 as sections 3171 to 3178g, inclusive, the particular sections relied upon being 3171, 3173*h*, 3173*i*, 3173*k*, 3173*g*, 3174*g* and 3178*a*.<sup>7</sup>

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<sup>7</sup> N. Y., §§ 20, 113, 114, 116, 132, 160, and 3. — C.

[After giving the substance of these sections, the court continues:]

The question at issue very largely turns upon what is meant by the terms of section 3173i,<sup>8</sup> the substance of which we here repeat: "Where a person not otherwise a party to an instrument places thereon his signature in blank before delivery, he is liable as indorser," etc. It seems to have been the view of the learned Circuit Court (see opinion by Dustin, J., 8 O. C. C. [N. S.] 290) that, inasmuch as the liability defined by the rules following the above-quoted portion of section 3173i does not differ essentially from the liability attaching to such party under the decisions of this court, no change in the law can be presumed to have been intended by the General Assembly in the enactment of the statute. Also, that the subsequent provisions of the sections relating to indorsers and providing what shall be done to fix liability, etc., are not inconsistent with this conclusion because the later sections apply only to general indorsers, and in those sections every indorser is described as such — is called an indorser — while in the earlier section the party described is only to be deemed an indorser, and has the liability of an indorser only to a limited extent. The contention, further, is that the terms of section 3173h<sup>9</sup> forbid the conclusion that such party is to be deemed an indorser in the commercial sense, because he must, in order to have that effect, place his name on the back otherwise than as maker, and the rule is, and was, that the person so placing his name is a maker unless he shows a different agreement between the parties.

There is much plausibility in these contentions, and they would seem to be sound were it not for the incorporation of the words "as indorser" in section 3173i. Had these words been left out of the section the construction claimed would not seem an unnatural one. But we are required, by the inexorable rule of construction, to give to them some signification — some meaning consistent with a rational purpose in placing them in the statute. The lawmakers were making law. They cannot be presumed to have been simply dealing with legal terms in a loose, popular sense. The word "indorser" has a distinct, clearly defined legal meaning. An indorser is one who undertakes to be responsible to the holder of the paper for the amount thereof, if the latter shall, at maturity, make legal demand of the payer, and, in default of payment, give proper notice thereof to the indorser. The language of the section is plain and free from ambiguity. The words express a clear meaning. The party has placed his name upon the instrument where general indorsers sign. He is not a party to the note, but is a stranger. Section 3171h says he shall be deemed to be an indorser unless he clearly indicates by appro-

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<sup>8</sup> N. Y., § 114. — C.

<sup>9</sup> N. Y., § 113. — C.



prate words his intention to be bound in some other capacity. He has not so indicated. He has used no words appropriate or otherwise. His status on the paper is, therefore, fixed by the emphatic words of the statute. Then follows the fixing of liability. He is liable "as indorser." And how is that? Why, he must pay when, and only when, proper demand has been made of the maker at maturity and legal notice given him. This is clearly shown by what follows. Every indorser who indorses without qualification engages that on due presentment and dishonor, and due notice to him, he will pay. This expresses the extent of his liability; without these requisites being complied with he is discharged. And, then, as though to cover a doubtful situation, the provision is (section 3171*p*)<sup>1</sup> that, where the language of an instrument is ambiguous, because of the signature being so placed that it is not clear in what capacity the person intended to sign, he is deemed to be an indorser. Of the rules prescribed by section 3173*i*, it is enough to say that they are not inconsistent with the obligation of the general indorser. He, too, is liable to those who come after him as indorsers or holder. The important question is, not *to whom* is such party liable, but *in what capacity* — *in what relation* — is he liable?

The contention that the provision (section 3173*k*)<sup>2</sup> to the effect that every indorser undertakes to pay if the instrument is dishonored and he has due notice applies only to general indorsers, we think untenable. The language forbids it. It is: "Every indorser who indorses without qualification," etc. The word "every" is a term of inclusion. It embraces every party who, by previous provisions, is classed as an indorser unless his indorsement has been qualified by appropriate words. Nor is the obligation as indorser imposed on the stranger an unreasonable one, for, if not content to assume the position of indorser, the opportunity to indicate upon the paper his intention to be bound in some other capacity is given him.

The contention that these later provisions relate only to general indorsers rests wholly on the assumption that in placing his name on the back in blank the stranger himself fixes his own position and that he has conclusively declared himself a maker; that is, that he has placed his name as maker. But it seems a sufficient answer to this to say that he has not and could not, by a mere blank indorsement, so place himself, because the statute fixes his position. That position is important only as it relates to his liability, and the statute has said that that liability is "as indorser." An indorser is not a maker or a drawer; not one primarily liable. This conclusion ignores neither the words, "A person placing his name upon an instrument otherwise than as maker," etc., nor the words, "Where a

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<sup>1</sup> N. Y., § 36. — C.

<sup>2</sup> N. Y., § 116. — C.

person not otherwise a party to an instrument places," etc. Both sections must be construed together. Thus construed, they simply describe a person who is not a party by the terms of the instrument. And he is not, in fact, such party, in any possible sense, at the time he places his signature. He remains a total stranger until he has placed his name on the back, and then the statute says he is an indorser.

But other considerations enter into the question. It is so much a matter of common knowledge as to make it proper to take judicial notice of the fact that the act herein considered was enacted because of an effort on the part of the bar of many, if not all, of the states of the Union to bring about a uniform system of law respecting negotiable instruments. In a substantial measure the effort has been successful. Of the states which had, by judicial decision, adopted the rule prevailing in this state, the legislatures of the following have enacted a Negotiable Instruments Act substantially like that of Ohio, viz.: Colorado, Maryland, Massachusetts, North Carolina, Rhode Island, and Utah. And it has been enacted also in the states of Connecticut, Florida, Iowa, New Jersey, New York, North Dakota, Oregon, Pennsylvania, Tennessee, Virginia, Washington, and Wisconsin. Joyce on Defenses to Commercial Paper, at page 859, gives a list of 32 states and territories which have passed the act. All of these several statutes are not framed, in the particular here under investigation, in the exact language of the Ohio act, but it is believed that they all embody the same principle, and it is manifest that one prominent motive leading to their enactment was the desire to establish a uniform law on the subject of negotiable instruments. And wherever these acts have received judicial interpretation in the several states this purpose has been recognized. See *Fessenden v. Summers*, 62 Cal. 484; *Fisk v. Miller*, 63 Cal. 367; *Downey v. O'Keefe*, 26 R. I. 571; *Thorpe v. White*, 188 Mass. 333, 7 Cyc. 673; *Bank v. Law*, 127 Mass. 72; *Toole v. Crafts*, 193 Mass. 110; *Gibbs v. Guaraglia*, 75 N. J. L. 168; *Baumeister v. Kuntz*, 53 Fla. 340; *Farquhar Co. v. Higham*, 16 N. Dak. 106; *Vander Ploeg v. Van Zuuk*, 135 Iowa, 350.

That this purpose was prominent in the minds of the members of our General Assembly in the enactment of the Ohio act is shown by the title of the act itself, which is: "An act to establish a law uniform with the laws of other states on negotiable instruments." The desirability of such legislation had been long felt by commercial people of our state as well as by the judiciary and the bar at large. Indeed, the learned jurist who reported the case of *Ewan v. Brooks-Waterfield Co.*, *supra*, gives expression to that sentiment in his opinion. True, it is, as suggested by the Circuit Court, that the act covers many phases of the subject, and that the title does not apply especially to the subject of indorsement, but inasmuch as this very

subject had been the source of irreconcilable conflict between judicial utterances in so many states, and that such differences of judicial interpretation of the common law had been so marked, and these differences so recently emphasized by this court, and the importance of uniformity in the law on this particular phase of the general subjects had been so recently pointed out, it is inconceivable, it seems to us, that the General Assembly, while treating the subject at large, should have failed to endeavor to establish uniformity respecting the position of indorsers and their liability to others connected with the paper. These considerations, if they stood alone, and if the language of the act were less plain than it is, would impose a duty upon this court to look for ground in the statute warranting the conclusion that the purpose of the act is to bring Ohio into harmony with the other states of the Union on so important a branch of the law as the relation of parties to commercial paper, but we are not compelled to resort to such an effort, for the plain, natural meaning of the language of the sections cited, as we think, fully warrants, if, indeed, it does not compel, the conclusion hereinbefore indicated, which conclusion is also supported by a number of the cases hereinbefore cited. See *Fessenden v. Summers*; *Fisk v. Miller*; *Downey v. O'Keefe*; *Thorpe v. White*; 7 Cyc.; *Bank v. Law*; *Toole v. Crafts*; *Gibbs v. Guaraglia*; *Baumeister v. Kuntz*; *Farquhar Co. v. Higham*; *Vander Ploeg v. Van Zuuk*.

But another purpose seems to us to be indicated by this legislation. Not only were the courts of the country in conflict respecting the attitude and liability of a third party — a stranger — who placed his name in blank on the back of commercial paper, but the situation was in itself an anomalous one, calculated to lead, as it often did lead, to confusion respecting the duty of the holder of such paper with regard to demand and notice. Mistakes in this respect were easy and were frequently made, often resulting in litigation, and, not infrequently, loss. To clear this situation up, and to establish a plain, easily understood rule, and one of universal application, was surely a result of high importance to all who deal in commercial paper, and it seems to us that the desire to accomplish this purpose had much to do with inducing the enactment of the Negotiable Instruments Act by our General Assembly.

It follows from these conclusions that by force of sections 3171, 3173*h*, 3173*i*, 3173*k*, 3173*q*, 3174*g*, and 3178*a* of the Revised Statutes of 1906, a person who, being a stranger to a promissory note, places his name on the back by blank indorsement, is an indorser of the paper and cannot be held in any other capacity. As such he is entitled, in order to render him liable, to notice of demand upon those who are primarily liable, and, failing such demand and due notice to him, he is discharged. The answer, therefore, stated a defense,

and the sustaining of the demurrer and rendering judgment for the bank upon the note was error. Judgment reversed, and cause remanded.

SHAUCK, C. J., and PRICE, CREW, SUMMERS, and DAVIS, JJ.,  
concur.

Reversed.<sup>3</sup>

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§ 114 HADDOCK, BLANCHARD & COMPANY v. HADDOCK.

192 NEW YORK, 499. — 1908.

THE Lenape Coal Company executed its promissory note payable to plaintiff. Plaintiff executed several bills of exchange payable to its own order and drawn upon certain coal companies. Said note after it had been signed by said Lenape Coal Company and each of said bills after they had been accepted by the corporation on which they were severally drawn were indorsed by the defendant before delivery, and thereafter before maturity delivered to the plaintiff as payee, and the plaintiff indorsed and procured them to be discounted. The above instruments were indorsed by the defendant for the accommodation of the maker of said note and the acceptor of said bills respectively and for the purpose of giving such maker and acceptors credit with the plaintiff, and the plaintiff was induced to take said instruments by reason of the indorsement of the defendant and pursuant to an agreement that the defendant would be liable thereon to the plaintiff in case the corporations primarily liable thereon should make default.

Thereafter the plaintiff was compelled to take up the above instruments, and this action is brought to compel the defendant to pay the amount of said instruments pursuant to his agreement with the plaintiff when he indorsed them. The plaintiff has succeeded in the courts below, and the defendant has appealed.

CHASE, J. \* \* \* As the facts are found, if the intention of the parties is to prevail, the defendant should be required to pay to the plaintiff the amount of such note and bills as established by the judgment.

The defendant contends that the position of his name upon the note and bills conclusively establishes that he indorsed the several instruments without liability to the plaintiff and that parol evidence should not have been received to affect or overcome the alleged conclusive presumption arising from his indorsements as made. \* \* \*

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<sup>3</sup> This case is reported in 14 L. N. S. 842, with a note entitled "Character under uniform negotiable instruments law of one who places his name on the back of a note prior to or at the time of delivery."

See also the notes on the liability of an anomalous indorser at common law and under the Negotiable Instruments Act in 5 Mich. Law. Rev. 189 (January, 1907), and in 23 Harv. Law Rev. 396 (March, 1910). — C.

There has always been conflict among the courts of the several states both in asserting the principles upon which irregular indorsers upon commercial paper are to be held and in the conclusion arrived at in particular cases litigated. The number of cases is so great, and the possibility of even a partial reconciliation of them so remote, that we will confine our citation of authorities wholly to those in this state.

It was well settled in this state for many years prior to the enactment of the Negotiable Instruments Law that a person who puts his name on the back of a bill or note before its delivery, is presumably a second indorser and not liable to the payee, but the presumption could be rebutted by parol evidence to show that the intention of the indorser was to become surety for some prior party to the instrument.<sup>4</sup>

The Negotiable Instruments Law was first enacted in this state in 1897. (Laws of 1897, chapter 612.) Section 113 of the said law provides: "A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity."

The defendant was within this definition an indorser of each of said instruments.

Section 114 of the said law provides: "Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as indorser in accordance with the following rules:

"1. If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties.

"2. If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer.

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<sup>4</sup> Citing *Moore v. Cross*, *supra*; *Bacon v. Burnham*, 37 N. Y. 614; *Meyer v. Hibsher*, 47 N. Y. 265; *Phelps v. Vischer*, 50 N. Y. 69; *Clothier v. Adriance*, 51 N. Y. 322; *Hubbard v. Matthews*, 54 N. Y. 43; *Coulter v. Richmond*, 59 N. Y. 478; *Easterly v. Barber*, 66 N. Y. 433; *Jaffray v. Brown*, 74 N. Y. 393; *Witherow v. Slayback*, 158 N. Y. 649; *Smith v. Weston*, 159 N. Y. 194; *Davis v. Bly*, 32 App. Div. 124; *affd.*, 164 N. Y. 527; *Far Rockaway Bank v. Norton*, 186 N. Y. 484; *Lester v. Paine*, 39 Barb. 616; *Foerster v. Squier*, 46 N. Y. S. R. 289; *Reed v. Photo-Gravure Co.*, 38 N. Y. S. R. 467; *Wyckoff v. Wilson*, 36 N. Y. S. R. 35; *Luft v. Graham*, 13 Abb. (N. S.) 175; *Draper v. Chase Mfg. Co.*, 2 Abb. (N. C.) 79; *Holz v. Woodside Brewing Co.*, 93 Hun. 192; *Meise v. Doscher*, 68 Hun. 557; *Bank of Port Jefferson v. Darling*, 91 Hun. 236; *Hendrie v. Kinnear*, 84 Hun. 141; *Montgomery v. Schenk*, 82 Hun. 24; *McPhillips v. Jones*, 73 Hun. 516; *Staiger v. Theiss*, 19 Misc. Rep. 170; *Rose v. Packard*, 4 Weekly Digest, 27; *Cuming v. Roderick*, 16 App. Div. 339; *McMoran v. Lange*, 25 App. Div. 11; *Howard v. Van Gieson*, 46 App. Div. 77; *Nagel v. Lutz*, 41 App. Div. 193.

"3. If he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee."

By this section of said law the presumption as established by the courts in this state was changed, and an irregular indorser is now presumed to be liable in accordance with the express language of the statute. Questions relating to the sufficiency of the pleadings are settled by the statute. A complaint upon a note or bill without alleging a collateral agreement between the parties whose names are on the instrument seeking to recover against a person except as provided by the statute, would clearly be demurrable.

The note of the Lenape Coal Company was payable to the plaintiff, a third person, and the defendant, according to the provisions of said section 114, is liable to the plaintiff, the payee therein. No serious contention has been made to the contrary. The serious question for consideration arises from the fact that the bills were payable to the maker and drawer thereof respectively and the defendant as an indorser thereon before delivery is not under the statute *prima facie* liable thereon to the plaintiff. Should parol evidence have been allowed to show the intent of the parties? We have not discovered any exception to the rule as established by the courts of this state allowing parol evidence as between the parties whose names appear on the bill or note to determine their liability as between themselves. It is frequently stated that where a note is payable to a person other than the maker and is indorsed by a third person before delivery the intention of the indorser is ambiguous and uncertain on the face of the paper and such uncertainty justifies the receipt of parol evidence to determine the true intention of the parties. We do not see that any greater certainty exists upon the face of a bill as to the true intention of the parties where it is drawn to bearer or to the order of the maker, and it is indorsed by a third person after acceptance by the acceptor and before delivery to the payee and maker. There is a certain rule of presumption determined by common law or by statute, but the alleged reason for the rule in either case is not very apparent. The long-established rule to allow parol evidence that the intention of the parties may prevail seems to have met with somewhat general approval without discussing specifically the principles upon which such evidence is admitted. \* \* \*

In *Good v. Martin* (95 U. S. 90) the court say: "Considerable diversity of decision, it must be admitted, is found in the reported cases where the record presents the case of a blank indorsement by a third party, made before the instrument is indorsed by the payee and before it is delivered to take effect, the question being whether the party is to be deemed an original promisor, guarantor or indorser. Irreconcilable conflict exists in that regard; but there is one principle upon the subject almost universally admitted by them all, and that is, that the interpretation of the contract ought in every

case to be such as will carry into effect the intention of the parties, and in most cases it is admitted that proof of facts and circumstances which took place at the time of the transaction are admissible to aid in the interpretation of the language employed. (*Denton v. Peters*, L. R. [5 Q. B.] 475.)” \* \* \*

It must constantly be borne in mind that the acceptance of a bill makes the acceptor the principal debtor. A bill when accepted becomes similar to a promissory note, the acceptor being the promisor and the drawer standing in the relation of an indorser. (Daniel on Negotiable Instruments [5th edition], section 532.) There is nothing in the Negotiable Instruments Law to indicate an intention on the part of the legislature to change the rule as established in this state relating to the receipt of parol evidence to determine the primary liability as between the persons whose names appear upon the instrument or as between those secondarily liable thereon.

By section 55 of the Negotiable Instruments Law it is provided: “An accommodation party is one who has signed the instrument as maker, drawer, acceptor or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party.”

Parol evidence is necessary to determine whether a party to an instrument, including an indorser thereon, is an accommodation party, and also to determine which other party to the instrument he had accommodated. The plaintiff was the holder of the note for value, and the evidence showed that the defendant was an accommodation indorser for the benefit of the acceptor.

The last subdivision of section 114, as we have quoted, makes parol evidence necessary to establish whether the indorser signed the instrument for the accommodation of the payee. It is true that this section does not expressly state that if the indorser signed for the accommodation of the acceptor he is liable to all parties subsequent to the acceptor, but the fact that such a provision is not included in section 114 does not prevent the admission of parol evidence to determine generally the questions relating to an accommodation party as provided by section 55.

The Negotiable Instruments Law by section 7 provides: “In any case not provided for in this act the rules of the law merchant shall govern.”

By section 118 of the Negotiable Instruments Law it is provided: “As respects one another, indorsers are liable *prima facie* in the order in which they indorse; but evidence is admissible to show that as between or among themselves they have agreed otherwise.”

As we have seen, upon the acceptance of the bill the acceptor becomes the principal debtor and the one primarily liable to pay the

amount of the bill, and all other parties to the instrument, including the maker and indorser, are secondarily liable. We are of the opinion that the maker of the bill is in legal effect and within the intention of this section an indorser, and that as between the plaintiff and the defendant parol evidence is authorized to determine the liability as between them.

The articles of the Negotiable Instruments Law relating to the presentation of bills and notes for payment and notice of dishonor (Articles 7 and 8) further show an intention by the legislature to leave the order of liability among those whose names are on the instrument subject to determination by any competent evidence. [Quoting sections 130, 139, 140, 160, 186, subd. 3.]

There is no reason that we can conceive why the legislature should intend to change the rule in regard to the admission of parol evidence as it had existed in this state for many years. All of the quotations that we have made from the Negotiable Instruments Law show that it has enlarged rather than restricted the rules allowing parol evidence to show the true liability and relation of the parties whose names appear upon the bill or note in all actions between themselves. It is certainly very material to the drawer of a bill whether an indorser signs it at his request or at the request and for the benefit of the acceptor. We do not think it was the intention of the legislature by the enactment of section 114 of the Negotiable Instruments Law to establish a rule as to the liability of an irregular indorser conclusive on the parties to the instrument as between themselves in an action where the facts showing a different intention are fully alleged. All of the decisions of our courts since the enactment of the Negotiable Instruments Law tend to sustain the views herein expressed. (*Corn v. Levy*, 97 App. Div. 48; *Kohn v. Consolidated Butter & Egg Co.*, 30 Misc. Rep. 725.) In the case last mentioned MCADAM, J., said: "Prior to the statute of 1897 (*supra*) the allegation referred to was a necessary one in such cases, and, if denied, the onus of proving the allegation was on the plaintiff, for the payee was presumably the first indorser. (Daniel's Neg. Inst. [4th ed.] sec. 704; Wood's Byles Bills, 151, note, and cases before cited.) Since the statute the legal presumption is changed where the complaint alleges that the irregular indorsers indorsed the paper 'before delivery' to the payee. And when this fact is established the onus is cast upon such indorsers to allege and prove that, notwithstanding such delivery, the payee was to become first indorser according to the customary form of the contract and that they did not indorse for the purpose of lending their credit to the maker or with the intention of becoming liable to the payee. That this is the proper interpretation of the act is obvious. The true intention of indorsers as between themselves can always be shown by oral evidence. (Daniel's Neg. Inst. *supra*; 4 Am. & Eng. Ency. of Law [2d ed.] 492 *et seq.*; *Guild*



v. *Butler*, 127 Mass. 386; *Cady v. Shepard*, 12 Wis. 639; Benjamin's Chambers Bills [2nd Am. ed.], 250; *Witherow v. Slayback*, 158 N. Y. 649.) To go further and decide that the statute intended to create an incontestable liability against irregular indorsers would be to impute to the legislative wisdom a design repugnant to every notion of judicial procedure, especially in a provision enacted in the interest of law reform."

The judgment should be affirmed, with costs.

CULLEN, Ch. J., HAIGHT, VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ., concur.

Judgment affirmed.<sup>5</sup>

## § 113 NATIONAL EXCHANGE BANK v. LUBRANO.

29 RHODE ISLAND, 64. — 1908.

ACTION on note. Plaintiff's declaration alleged "that D. Di Luglio and Michael Lubrano, doing business as D. Di Luglio Company, \* \* \* by their note \* \* \* by them signed as D. Di Luglio Company \* \* \* promised said plaintiff to pay it or order \* \* \* and the said defendant individually then and there indorsed and delivered said note to said plaintiff." The declaration then alleged presentment to makers when due, failure to pay, and due notice to defendant of the dishonor of the note. Defendant demurred to the declaration on the ground that by the declaration it

<sup>5</sup> This case is reported in 19 L. N. S. 136, with note entitled "Admissibility of parol evidence to vary the liability of an irregular party to a bill or note from that declared by the Negotiable Instruments Act."

See also *Mercantile Bank of Memphis v. B. I. Busby, et al.*, 120 Tenn. 652, where the court, on page 666, says: "We are of opinion that the real contract between the parties can be shown now as fully as it could have been shown before the passage of the Negotiable Instruments Act, and that, as between the immediate parties, it is not necessary that the indorsement should be accompanied by appropriate words in writing, showing an intention to be bound in some other capacity. As to innocent holders for value, the rule, of course, would be otherwise, and the statute would apply."

But in *Baumeister v. Kuntz*, 53 Fla. 340, at p. 345, the court said: "The main question for determination is: Does the indorsement in blank before delivery of a promissory note for the purpose of giving credit to the maker, so fix as matter of law not the status but the liability and rights of such an indorser, as between the original parties, that it cannot be shown that by the course of conduct of the parties attending the indorsement, that the right of the indorser to have demand made on the maker of the note for payment at maturity, was waived so as to make the indorser's liability not dependent upon such demand? By the terms of the statute [namely, the Negotiable Instruments Law] when a person not otherwise a party to a negotiable instrument places thereon his signature in blank before delivery, his status is fixed as that of an indorser. Where the statute fixes the status of a party to a negotiable instrument as being that of an indorser, parol evidence is not admissible to vary such status." — C.

appeared that defendant's liability on the note was a joint liability with one D. Di Luglio, and not a several liability. Demurrer was overruled and defendant excepted.

PARKHURST, J. \* \* \* The first exception must be overruled. The declaration shows that the defendant, Lubrano, was a maker of the note as a partner with one D. Di Luglio, under the firm name of "D. Di Luglio Company," as signed on the note. If Lubrano had placed his name upon the back of the note before delivery, under the law of this state, as it existed prior to the passage of the "Negotiable Instruments Act" (chapter 674, p. 222, Jan., 1899), he would simply have become a joint maker of the note. As he was a maker already, his relation to the note would not have been changed, and his liability thereunder would neither have increased nor diminished. His act would simply have been nugatory. Under the Negotiable Instruments Act, however, we think he may fairly be held to have made himself an indorser under the provisions of section 71,<sup>6</sup> viz.: "A person placing his signature upon an instrument otherwise than as maker, drawer, or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity." See, also, Negotiable Instruments Act, p. 228, c. 674, § 25, cl. 6.<sup>7</sup> See *McLean v. Bryer*, 24 R. I. 599; *Downey v. O'Keefe*, 26 R. I. 571; *Deahy v. Choquet*, 28 R. I. 338. In other words, we are of the opinion that the defendant, by so indorsing said note, added to his liability as maker a several and distinct liability as indorser, thereby making himself individually liable for the payment of the note, after due notice of dishonor, and thereby also guaranteeing the signature on the face of the note, and that the plaintiff had a right, if it saw fit, to sue him as such indorser, as it has done. The demurrer to the declaration was therefore properly overruled.<sup>8</sup>

#### 4. ORDER OF INDORSER'S LIABILITY.

### § 118

#### MOORE v. CUSHING.

162 MASSACHUSETTS, 594. — 1895.

CONTRACT, against Louis T. Cushing and Harvey H. Pratt upon the following promissory note:

\$500.

24 July, 1893.

Three months after date, I promise to pay to the order of William Moore five hundred dollars. Payable at any bank in Boston. Value received.

HARVEY H. PRATT.

(Indorsed): Louis T. Cushing, William Moore.

<sup>6</sup> N. Y., § 113. — C.

<sup>7</sup> N. Y., § 36. — C.

<sup>8</sup> See, also, *Germania Nat. Bank v. Mariner*, 129 Wis. 544, ante, p. —. — C.

The case was submitted to the Superior Court, and, after judgment for the plaintiff, to this court, on appeal, on agreed facts, in substance as follows:

Before the delivery of the note Pratt requested the plaintiff to get it discounted, and the plaintiff refused unless there was a satisfactory indorser. Thereupon the plaintiff accompanied Pratt to the office of Cushing, whom the plaintiff told that he was going to have the note discounted for Pratt, provided Pratt obtained a satisfactory indorser. The plaintiff asked Cushing if he was good for the amount, and Cushing said that he was, and that the note would be paid when due; and that he was willing to indorse the note for the accommodation of Pratt, so that the note might be discounted for his benefit. The note was then indorsed by Cushing at the request of Pratt, and was delivered to the plaintiff, who thereafter himself indorsed it and had it discounted, and the proceeds were used for the benefit of Pratt. The plaintiff was obliged to pay the note, and Cushing alone defended, Pratt having been defaulted.

HOLMES, J.—This is a suit upon a note between two persons, who both became parties on it for the accommodation of the maker. The defendant Cushing indorsed the note before delivery; the plaintiff is the payee, and indorsed after the defendant. If the plaintiff had not known that the defendant indorsed the note for accommodation, he would have been entitled to recover. (*Woods v. Woods*, 127 Mass. 141.) Knowledge of that fact under the circumstances stated does not affect his rights. In the absence of agreement, successive indorsers for the accommodation of a third person are liable in the same order as indorsers for value. (*Shaw v. Knox*, 98 Mass. 214; Danl. Neg. Inst. [3d ed.], § 703.) The conversation which took place between the parties, so far from expressing a different agreement, gave notice to the defendant that the plaintiff required his indorsement as the condition of becoming a party. It fortifies the presumption arising from the face of the paper. The suggestion on behalf of the defendant, that he signed also for the accommodation of the plaintiff, perverts, if it does not contradict, the agreed facts. It was urged that the plaintiff took the note when overdue. But his rights and liabilities were fixed at the time of his indorsement. If the argument was sound, the judgment ought to have been for the defendant-indorser in *Woods v. Woods*.

Judgment affirmed.<sup>9</sup>

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<sup>9</sup> Successive indorsements import a several, and not a joint, liability. A joint action cannot be brought against successive indorsers except by aid of statute. *Wolf v. Hostetter*, 182 Pa. 292. Such statutes authorizing the joining of all parties to a negotiable instrument in one action are common in the American States. N. Y. Code Civ. Proc., § 454; *Pomeroy, Remedies*, §§ 402-410; 3 Randolph, Comm. Paper, § 1669. — H.

## § 118

## GEORGE v. BACON.

138 APPELLATE DIVISION (N. Y.) 208. — 1910.

ACTION by Elizabeth W. George, as committee of the person and property of Clara G. Barnabee, an incompetent person, against Charles E. Bacon. From a judgment for plaintiff and from an order denying defendants' motion for a new trial, he appeals.

SCOTT, J. This is an action for contribution by one indorser upon a promissory note against a subsequent indorser. The defendant appeals from a judgment upon a verdict directed by the court. The note was signed in the name of "The Bostonian's Incorporated," by its president. The corporation was engaged in giving operatic performances. Its principal office was in the city of New York at the office of Loudon G. Carleton (also an indorser), who was an officer and general director of the company. The defendant, Bacon, was manager of the company, and acted as treasurer while the company was traveling. Barnabee, the president, was one of the performers, as was also McDonald, an indorser. The incompetent plaintiff was the wife of Barnabee, and it was she who ultimately paid the note. The company appears to have been stranded in Pittsburgh and needed money to get home. The note, after it had been indorsed by all of the indorsers, was discounted at the New Amsterdam Bank, and the proceeds were checked out by the defendant, Bacon, in pursuance of the purposes for which the note was made. Bacon made the arrangements with the bank for the discount of the note, and procured it to be signed by the president. It does not appear whether or not the incompetent signed at his request. The incompetent's indorsement is the third in order, and Bacon's is the fifth. The defendant relies solely upon section 118 of the negotiable instruments law (Consol. Law, c. 38), which reads as follows: "Order in which indorsers are liable. As respects one another, indorsers are liable *prima facie* in the order in which they indorse; but evidence is admissible to show that as between or among themselves they have agreed otherwise. Joint payees, or joint indorsers who indorse are deemed to indorse jointly or severally."

If there was sufficient evidence in the case to justify a finding that the parties had otherwise agreed among themselves, the *prima facie* presumption disappears, and the indorser who actually pays the note is entitled to contribution. And it is not necessary that there shall be proof of an actual formal contract in so many words. It is sufficient if the surrounding circumstances indicate that the indorsements were made upon the common understanding that all the indorsers should participate in the liability.

"Their lordships see no reason to doubt that the liabilities *inter se* of the successive indorsers of a bill or promissory note must, in the absence of all evidence to the contrary, be determined according

to the ordinary principles of the law merchant. He who is proved or admitted to have made a prior indorsement must, according to these principles, indemnify subsequent indorsers. But it is a well-established rule of law that the whole facts and circumstances attendant upon the making, issue, and transference of a bill or note may be legitimately referred to for the purpose of ascertaining the true relation to each other of the parties who put their signatures upon it, either as makers or as indorsers, and that reasonable inferences derived from these facts and circumstances are admitted to the effect of qualifying, altering, or even inverting the relative liabilities which the law merchant would otherwise assign to them." *McDonald v. Whitfield*, 8 App. Cas. (H. of L.) 733, 745.

"It is not necessary that there should be a contract in so many words to sign as co-sureties. It was sufficient if it appeared, taking all of the circumstances into account, that that was the nature of the liability which, as between themselves, the parties intended to assume and did assume." *Weeks v. Parsons*, 176 Mass. 570-575.

The significant circumstances in the present case are that all of the indorsers were engaged in a common enterprise; that the money to be raised on the note was for the furtherance of that enterprise; and, so far as appears, that one indorser was as much interested in the enterprise and as much to be benefited by raising the money as was any other. It is likewise a very significant circumstance, as bearing upon the mutual obligations of the indorsers to each other, that all the indorsements were put on the note before it was issued, and solely to give it credit with the bank, and that no indorser gained any profit or advantage from the note except such as was shared by all in the pursuit of the common enterprise. *Hagerty v. Phillips*, 83 Me. 336.

"The indorsements upon bills of exchange or promissory notes rest upon the theory that the liability of indorsers to each other is regulated by the position of their names, and that the paper is transferred from one to the others by indorsement. But this rule has no practical application to accommodation indorsers, where neither of them has owned the paper, and no such transfer has been made." *Easterly v. Barber*, 66 N. Y. 433, 437.

We are therefore of the opinion that enough appeared to justify a finding that the indorsers upon the note, as between themselves, became joint sureties for the payment of the note, and that the incompetent, having paid it, was entitled to contribution from her co-indorsers. The defendant offered no evidence and made no request to go to the jury, contenting himself with a motion to dismiss the complaint upon the plaintiff's proofs.

It follows that the judgment and order appealed from must be affirmed, with costs. All concur.

## § 118

## WILSON v. HENDEE.

74 NEW JERSEY LAW (CT. ERR. &amp; APP.) 640. — 1907.

PLAINTIFF was nonsuited on the trial and brings error.

PITNEY, J. — On May 12, 1904, one Walter D. Wilson made his promissory note for \$920 payable to the order of the Vineland National Bank. Prior to its delivery to the payee the note was indorsed successively by Charles W. Wilson, the plaintiff herein, and by the defendant Hendee, for the accommodation of the maker. The paper having gone to protest at maturity, the plaintiff was obliged to pay, and did pay, the whole amount of it to the bank.

The present action is based upon an alleged agreement made between Hendee and the plaintiff prior to the indorsement of the note by either of them, to the effect that, if plaintiff would become indorser, Hendee would likewise indorse, and would pay the note at maturity, and indemnify the plaintiff and save him harmless against all loss by reason of his indorsement, in consideration of certain valuable personal property to be placed in his hands by the maker. \* \* \* It will be well to consider whether either the common-law rule or the Negotiable Instruments Act (P. L. 1902, p. 583) excludes the parol evidence upon which alone was rested the proof of the agreement for whose breach recovery was sought in the present case.

The note in question was made by Walter D. Wilson to the order of the bank, and was indorsed by the parties to this suit prior to its delivery to the bank. As the law stood in this State before the enactment referred to, their signatures would *per se* have created no implied or commercial contract whatever, their liability to the payee would have depended upon extrinsic evidence to show the intent with which they became parties, and parol evidence would have been competent for the purpose of showing such intent. *Chaddock v. Vanness*, 35 N. J. Law, 517. Had the payee afterwards indorsed the note, and had it come to the hands of a *bona fide* holder before maturity, the irregular indorsers might have been subjected to the liability of second indorsers. *Crozer v. Chambers*, 20 N. J. Law, 256. But, as between the original parties, the question whether any contract was made, and, if so, what was the character of that contract, was to be determined by the intention of the parties as ascertained by parol evidence of the circumstances under which the indorsement was made; evidence of this sort not being objectionable on account of a tendency to vary a written contract, when no contract would arise except for such evidence. *Chaddock v. Vanness*, 35 N. J. Law, 523.

Even with respect to negotiable paper regular in form, our decision recognized the admissibility of parol evidence as between the immediate parties for the purpose of showing that a note or indorsement was made for accommodation, or made without consideration, or upon

a consideration that was conditional and was not performed. *Gilbert v. Duncan*, 29 N. J. Law, 133; *Id.* 521; *Chaddock v. Vanness*, 35 N. J. Law, 520.

But, as a general rule with respect to paper regular in form, our decisions did not, even as between the parties, admit of the introduction of parol evidence to vary the commercial contract that was held to arise from the terms of the instrument; for instance, as between successive accommodation indorsers, *Johnson v. Ramsey*, 43 N. J. Law, 279; *Middleton v. Griffith*, 57 N. J. Law, 442, 448; *Kling v. Kehoe*, 58 N. J. Law, 529; *Foley v. Emerald Brewing Co.*, 61 N. J. Law, 428, 431.

In other jurisdictions the rule adopted in this state with respect to excluding parol evidence of the intent of the parties to a negotiable instrument regular on its face, where such evidence would tend to vary the contract that the law merchant implies from the form of the instrument, was not uniformly adhered to, it being held in many states that in actions between the parties parol evidence was admissible to show that they had agreed otherwise than as would appear from the face of the note. 1 Dan. Neg. Inst. (6th Ed.) § 717, and cases cited; 2 Rand. Com. Paper, §§ 740, 741, 778, 779, and cases cited; *Crawf. Ann. Neg. Inst. Law* (2d Ed.) § 118.

In this state of the law our new Negotiable Instruments Act was passed, P. L. 1902, p. 583. Prior to its enactment a similar act, or one substantially similar, had been adopted in 16 American states, and had been enacted by Congress as the law of the District of Columbia. *Crawf. Ann. Neg. Inst. Law*, preface to second edition. We must attribute to our Legislature an intent to render the law of this state respecting negotiable instruments conformable to the law in these other states. And at the same time it is obvious that the act was intended to do away with some of the distinctions established or recognized by our adjudicated cases respecting the form and mode in which a contract of indorsement might be entered into, and the effect of making such an indorsement, whether as between the parties or with respect to subsequent holders of negotiable paper. By section 63<sup>1</sup> of that act (P. L. 1902, p. 594), "a person placing his signature upon an instrument otherwise than as maker, drawer or acceptor, is deemed to be an indorser unless he clearly indicates by appropriate words his intention to be bound in some other capacity." This, of course, abrogates so much of *Chaddock v. Vanness*, 35 N. J. Law, 517, 10 Am. Rep. 256, as held that an irregular indorsement of itself imported no implied or commercial contract whatever.

Section 64<sup>2</sup> is as follows:

[Quoting it.]

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<sup>1</sup> N. Y., § 113. — C.

<sup>2</sup> N. Y., § 114. — C.

It will be observed that this section deals with the rights of the payee and subsequent parties, and has not the effect of defining the rights and liabilities of several irregular indorsers as between themselves. These are set forth in section 68,<sup>3</sup> which reads as follows: "As respects one another, indorsers are liable *prima facie* in the order in which they indorse; but evidence is admissible to show that as between or among themselves they have agreed otherwise," etc.

This does not, by express mention, sanction parol evidence; neither does it expressly exclude any kind of evidence, whether written or verbal. Is parol evidence excluded by implication? If the legislative design was to admit only written evidence for the purpose indicated, it would have been unnecessary to say anything upon the subject, for by the common-law rules of evidence other writings explanatory of the real agreement would, of course, have been admissible. When we recall that a previous section had brought irregular and regular indorsers into a single category in the absence of an expressed intention to the contrary, that the first clause of section 68 renders the mere act of indorsement only *prima facie* evidence of the contract as between successive indorsers, and that by previous decisions parol evidence as between irregular indorsers was for all purposes admissible, and as between regular indorsers was for some purposes admissible and for other purposes not, it is easy to arrive at the conclusion that the section was intended to admit parol evidence in all cases between indorsers for the purposes of showing what was the agreement amongst themselves. This view brings our state into accord with the rule already laid down in some other jurisdictions as the common-law rule. At the same time it does not destroy the value of the instrument as a commercial instrument, for it is not against those who subsequently take the instrument in the course of commerce that the explanatory evidence is admitted. When we remember that the rules of the law merchant in this regard were established especially for the protection of subsequent holders of the instrument, and that the liability of indorser arises not from any words expressed upon the paper but from implications that originated in the necessities of trade and commerce, it is reasonable to attribute to the Legislature an intent to leave the paper open to explanation by parol as between the indorsers themselves.

This is the effect that was given to section 68 of the act in the recent decision of this court in the case of *Morgan v. Thompson*, 72 N. J. Law, 244.

In our opinion, therefore, the act admits of the introduction of parol evidence to show the actual agreement made between several indorsers, notwithstanding it contradicts the *prima facie* inference appearing from their successive indorsements. \* \* \*

Judgment for defendant reversed and a new trial granted.

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<sup>3</sup> N. Y., § 118. — C.



## § 118

LANE *v.* STACY.

8 ALLEN (MASS.) 41. — 1864.

BILL in equity to compel defendant to assign to plaintiff one-half the security given to protect plaintiff and defendant's intestate as payee-indorsers of a note. The note was made by the mortgagor to plaintiff and the intestate, and by them indorsed. The mortgage was given to the intestate without plaintiff's knowledge.

HOAR, J. — It is not denied by the defendant that a surety is entitled to share in the benefit of the security taken by his co-surety. But he contends that his intestate was not the co-surety of the plaintiff; and relies upon the well-settled rule that the liability of successive indorsers upon a note is fixed by the contract which the position of their names upon the paper establishes, and that, unless by express agreement, one is not bound to contribute to a payment of the note by the other, even if both are accommodation indorsers. The principle is sound, but has no application to the case at bar. Stacy and Lane are not successive indorsers. They are joint indorsers. The note was made payable to their joint order, and could only be transferred by their joint act. Which name is first put upon the paper is therefore immaterial, as by the indorsement they incurred a joint responsibility for the debt of the promisor. Each is therefore entitled to share in the security taken by the other.

Decree according to the prayer of the plaintiff's bill.<sup>1</sup>

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**VI. Acceptor for honor.**

See § 284, *post.*, pp. 701-706.

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**VII. Guarantor.**

1. (a) DOES A GUARANTY-INDORSEMENT BY THE HOLDER TRANSFER TITLE?

TRUST CO. *v.* NATIONAL BANK, 101 U. S. 68, *ante*, p. 263.

ELGIN CITY BANKING CO. *v.* ZELCH, 57 Minn. 487, *ante*, p. 265.

JOHNSON *v.* MITCHELL, 150 Tex. 212, *ante*, p. 289.

1. (b) MAY A GUARANTY BE WRITTEN ABOVE A BLANK INDORSEMENT?

BELDEN *v.* HANN, 61 Iowa, 42, *ante*, p. 269.

SCOTT *v.* CALKIN, 139 Mass. 529, *ante*, p. 270.

CLARKE *v.* PATRICK, 60 Minn. 269, *ante*, p. 270.

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<sup>1</sup> See Neg. Inst. L., § 71. This section (118) changes the law to the extent of rendering the obligation joint and several instead of joint. — H.

## 2. IS A TRANSFEREE A HOLDER IN DUE COURSE?

TRUST CO. *v.* NATIONAL BANK, 101 U. S. 68, *ante*, p. 263.

ELGIN CITY BANKING CO. *v.* ZELCH, 57 Minn. 487, *ante*, p. 265.

DUNHAM *v.* PETERSON, 5 N. Dak. 414.

## 3. WHAT IS THE CONTRACT OF THE GUARANTOR?

BROWN *v.* CURTISS.

2 NEW YORK, 225. — 1849.

ACTION against defendant as guarantor of a promissory note. Defendant was payee of the note. He wrote upon it, "I guaranty the payment of the within; Charles Brown," and transferred it to plaintiff in payment of a debt. No demand on the maker, or notice of non-payment to defendant. Defendant offered to show that for several years after the note fell due the maker was solvent; that he then failed, and was insolvent at this time. Evidence excluded. Judgment for plaintiff.

BRONSON, J. — It is said, on the one side, that the defendant is the maker of a promissory note, and liable as such; and on the other side that he is an indorser, and has been discharged for the want of demand and notice. And strange as it may seem, there are cases in the books which go to uphold both of these positions. But they are both wrong. The defendant is neither maker nor indorser of a promissory note. On the contrary, he has in very plain terms made a contract of a different kind from either of those — one well known to the law; and by that contract he must either stand or fall. He has guarantied the payment of G. F. Brown's note; and we have no right to turn that contract into one of a different kind. This is so plain a principle that it would seem to be enough to mention it, without saying anything more. And yet there are cases which hold, that the guarantor of a promissory note may sometimes be treated as maker, and some times as indorser. This has usually been allowed for the purpose of giving effect to the supposed intention of the parties, as ascertained from extrinsic evidence; though there has not always been so fair an apology for altering the contract. But on whatever ground the courts may have acted, it is a dangerous proceeding. At the very best, it violates the salutary rule, that all prior negotiations between the parties are to be deemed merged in the final written agreement; and allows that agreement to be overruled by the conversations which preceded it. If the parties have made a mistake in drawing up their contract, the instrument may be reformed in equity, by a direct proceeding for that purpose. But the courts can have no right, under color of construing the agreement, to say that it means something else from what the language of the instrument plainly imports.

I have contended earnestly, though not always with success, for this doctrine. (*Seabury v. Hungerford*, 2 Hill, 80; *Miller v. Gaston*, Id. 188; *Manrow v. Durham*, 3 Id. 587; *Leggett v. Raymond*, 6 Id. 639.) But the side of truth and principle will sooner or later prevail; and the decisions of the court of errors in *Hall v. Newcomb* (7 Hill, 416; 3 Id. 233, s. c.), and of this court in *Spies v. Gilmore* (1 Comst. 321), have greatly shaken, if they have not entirely overthrown the cases in which the courts have taken the liberty to remodel the contract of the parties. Those cases have never had any ground of principle to stand on, and I trust they will never again be cited as authority in this state.

I do not mean that the very words of an agreement are always to be followed. Construction is often necessary for the purpose of ascertaining what the parties intended by the words which they used. But when the meaning of the instrument has been ascertained, the office of construction is at an end; and the contract can only be enforced as the parties have made it. The defendant has very plainly contracted as a guarantor. If he is not liable as such, he is not liable at all; and if he is liable as such, he cannot get rid of the obligation by calling himself an indorser, or anything else.

The undertaking of the defendant was not conditional, like that of an indorser; nor was it upon any condition whatever. It was an absolute agreement that the note should be paid by the maker at maturity. When the maker failed to pay, the defendant's contract was broken, and the plaintiff had a complete right of action against him. It was no part of the agreement that the plaintiff should give notice of the non-payment; nor that he should sue the maker, or use any diligence to get the money from him. The cases in Massachusetts, Maine, and Pennsylvania, which hold a different doctrine, (*Oxford Bank v. Haynes*, 8 Pick. 423; *Talbot v. Gay*, 18 Id. 534; *Gamage v. Hutchins*, 23 Maine, 565; *Gibbs v. Cannon*, 9 Serg. & R. 198; *Isett v. Hoge*, 2 Watts, 128), are not law in this state. With us, proceedings against the maker are only necessary where there is a guaranty of collection.<sup>2</sup> The point was decided long ago that a guaranty of *payment*, like the one in question, is not conditional, but an absolute undertaking that the maker will pay the note when due. (*Allen v. Rightmere*, 20 John. 365.)<sup>3</sup> All of our cases go upon that

<sup>2</sup> *Sylvester v. Downer*, 18 Vt. 32; *Forest v. Stewart*, 14 Oh. St. 246. — H.

<sup>3</sup> Accord: *Bank v. Hopson*, 53 Conn. 453; *Hance v. Miller*, 21 Ill. 636; *Studabaker v. Cody*, 54 Ind. 586; *Roberts v. Hawkins*, 70 Mich. 566; *Clay v. Edgerton*, 19 Oh. St. 549. [*Elgin City Bking. Co. v. Hall*, 119 Tenn. 548. — C.]

Contra: (Contract conditional) *Crooks v. Tully*, 50 Calif. 254; *Rockford N. B. v. Gaylord*, 34 Iowa, 246; *Newton Wagon Co. v. Diers*, 10 Neb. 284; *Mizner v. Spier*, 96 Pa. St. 533; cases from Me., Mass., and Pa., criticised in the principal case. But the guarantor may waive the holder's laches. *Sigourney v. Wetherell*, 6 Met. (Mass.) 553; *Pattillo v. Alexander*, 96 Ga. 60. — H.

ground. Some of them go so far as to hold, that the guarantor may be treated as the maker of a promissory note. (*Manrow v. Durham*, 3 Hill, 584; *Luqueer v. Prosser*, 4 Hill, 420; 1 Id. 256.) That doctrine cannot be defended. Although the undertaking is absolute, it differs essentially from a promissory note. The guarantor does not promise to pay himself, but that the maker will pay. Still, such cases prove that our courts are far enough from holding the contract to be conditional. It follows from what has been said that the evidence offered by the defendant was properly excluded. Proof that when the note became due, and for several years afterwards, the maker was abundantly able to pay, and that he had since become insolvent, would be no answer to this action. The defendant was under an absolute agreement to see that the maker paid the note at maturity.

If there had been an indorser on the note prior to the guaranty, and the plaintiff had allowed him to be discharged by neglecting to demand payment and give him notice, it may be that the defendant would have had a good answer to the action. But it is not necessary to consider that question; for there was no indorser, and nothing has been done or omitted to discharge the maker. If the defendant wished to have him sued, he should have taken up the note, and brought the suit himself. The plaintiff was under no obligation to institute legal proceedings.

The only remaining question is on the statute of frauds. (2 R. S. 135, § 2.) If the case is within the statute, it is impossible to get over the objection that no consideration is expressed in the guaranty.

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[See the excellent article by William P. Rogers, Esq., in 6 Col. Law Rev. 229 (April, 1906), entitled "Demand on principal before action against guarantor," where the authorities are carefully analyzed.

On page 236. Mr. Rogers says: "The language of the court in *Heyman v. Dooley et al.* [(1893) 77 Md. 162, 165] touching the subject of demand and notice, accords with the writer's views of the law on this subject. The court there said: 'It is to be regretted that upon such a question there should be such a conflict of judicial opinion. This conflict has mainly arisen from a departure from the firmly settled rule of the common law in regard to contracts of guaranty, and the attempt to engraft upon such contracts, in a modified form it is true, the law of demand and notice by which the liability of an indorser of negotiable paper is governed. . . . In the case of an absolute guaranty, however, there is no condition annexed to the contract itself, nor is any condition implied by law, requiring the guarantee to notify the guarantor of the default of the principal. On the contrary, his liability is governed by the same rules of law by which the ordinary liability of one who has broken his contract is determined. And this being so, if one guarantees in absolute terms the performance of a specific act or contract by another, his liability being commensurate with that of the principal, whatever proof is necessary to support an action against the principal will be sufficient in an action against the guarantor. And as demand upon the principal is not necessary to support an action against him for a breach of his contract, it is not necessary to allege or prove notice of demand upon and default of the principal to charge the guarantor.' " — C.]

I know it was held in *Manrow v. Durham* (3 Hill, 584), that a guaranty like this was a promissory note, which imports a consideration, and was therefore valid. But that case, which has been questioned elsewhere (Story, Prom. Notes, 597), as well as at home, cannot be law. An undertaking that another man will perform his contract is not a promissory note. It is not within any definition which was ever given of a promissory note, and it cannot be held to be such, without confounding all legal distinctions in relation to the nature of contracts.

But I think the statute of frauds does not apply to this case. Although in form this is a promise to answer for the debt or default of another, in substance it is an engagement to pay the guarantor's own debt, in a particular way. He does not undertake as a mere surety for the maker; but on his own account, and for a consideration which has its root in a transaction entirely distinct from the liability of the maker. The defendant was a debtor to the plaintiff, and gave the note, with the guaranty, to satisfy that debt. This belongs to the third class of cases mentioned by Kent, Ch. J., in *Leonard v. Vredenburg* (8 John. 38, 39). There was a new and distinct consideration, independent of the debt of the maker, and one moving between the parties to the new promise. In such cases, where the party undertakes, for his own benefit, and upon a full consideration received by himself, the promise is not within the statute. It would be good without any writing. The point was decided by the Supreme Court in *Johnson v. Gilbert* (4 Hill, 178), and I do not think it necessary to refer to other cases holding the same doctrine.<sup>4</sup>

The case of *Manrow v. Durham* might have been placed upon the same ground on which I have put this, if Durham alone had signed the guaranty. He made the promise upon a new consideration, moving between the plaintiff and himself. But Moulthrop, the other defendant, was a mere surety, and as to him the case was clearly within the statute.

STRONG, J., also delivered an opinion.

JEWETT, CH. J., and GARDNER, J., were of opinion that the guaranty was within the statute of frauds, and therefore void.

Judgment affirmed.

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<sup>4</sup> "The reasoning to take this promise out of the statute is quite subtle, and I should have much difficulty in yielding it my assent, but for the authorities which I think ought now to control."—EARL, J., in *Milks v. Rich*, 80 N. Y. 260. 271. See also *Darst v. Bates*, 95 Ill. 493; *Sheldon v. Butler*, 24 Minn. 513; *Wyman v. Goodrich*, 26 Wis. 21; *Hassinger v. Newman*, 83 Ind. 124; cf. *Dows v. Swett*, 134 Mass. 140.

One who signs as surety with the maker is liable as an original promisor; the statute of frauds does not apply to the case. *Casey v. Brabason*, 10 Abb. Pr. (N. Y.) 368; *Frech v. Yawger*, 47 N. J. L. 157; *Paul v. Stackhouse*, 38 Pa. St. 302.

## 4. IS THE GUARANTY TRANSFERABLE?

(a) *Is it negotiable?*<sup>5</sup>

TRUE v. FULLER.

21 PICKERING (MASS.) 140. — 1838.

SHAW, C. J., delivered the opinion of the court. The facts bearing upon this question may be thus stated. Morse made three promissory notes to Elisha Fuller, or his order, payable in two, three and five years, respectively, from date, and gave a mortgage to secure the payment of them. The notes were indorsed in blank by the payee. On the same notes was indorsed a guaranty in this form: "I guaranty the payment of semi-annual interest on this note, as well as the principal," and signed by the defendant. The notes thus indorsed were transferred, and the mortgage assigned. The mortgaged premises were entered on for breach of condition, and the mortgage foreclosed. The notes have regularly come to the hands of the plaintiff.

The court are of opinion that the plaintiff is not entitled to recover, because, the guaranty in question was not made to him, or whilst he was holder of the note; that it was not negotiable in itself, and was not made so by being written upon and intended to secure a negotiable instrument. This instrument being filled up and signed, is complete in itself, and it cannot be altered either by striking out words so as to convert it into a general indorsement, or by filling up, as in case of a blank indorsement. In the latter case, an indorser, by leaving a blank over his name, tacitly agrees that any subsequent lawful holder may insert suitable words to render him liable in the same manner and to the same extent, implied by his indorsement and the usages of business.

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Where one, not the payee or holder, signs a guaranty upon the instrument there are two cases. (1) If signed before delivery, it "requires no other consideration to support it, and need express none other (even where the statute requires the consideration of the guaranty to be expressed in writing), than the consideration which the note upon its face implies to have passed between the original parties. (2) But a guaranty written upon a promissory note after the note has been delivered and taken effect as a contract, requires a distinct consideration to support it; and if such a guaranty does not express any consideration, it is void, where the statute of frauds requires the consideration to be expressed in writing." — *Moses v. Lawrence County Bank*, 149 U. S. 298; cf. *Scott v. Calkin*, 139 Mass. 529, ante, p. 270.

An oral acceptance without consideration has been held to be within the statute. *Manley v. Geagan*, 105 Mass. 445; *Walton v. Mandeville*, 56 Iowa, 597. Contra: *Jarvis v. Wilson*, 46 Conn. 90. An oral acceptance upon consideration is held not to be within the statute. *McCutchen v. Rice*, 56 Miss. 455; *Nelson v. First Bank*, 48 Ill. 36; *Louisville Co. v. Caldwell*, 98 Ind. 245; *In re Goddard*, 66 Vt. 415. — H.

<sup>5</sup> Whether it be a guaranty-indorsement by a holder, or be written on the bill by a third party, seems immaterial when this question is involved. — H.

This guaranty expresses no consideration, nor does it name any person as the guaratee, to whom it is made. But suppose these could be supplied by parol proof, it could only enure to the person who was the holder at the time the guaranty was given, who was not the plaintiff.

Had the defendant intended, by the credit of his name, to give a general currency to the note, as a negotiable security, there was no reason why he should not have indorsed it generally, in which case he would have been responsible to any person who might afterwards become the holder. As it is, it is no more a negotiable promise than if it had been written on a separate paper, referring to the note, and guarantying it to the then holder. (*Tyler v. Binney*, 7 Miss. R. 479; *Lamourieux v. Hewit*, 5 Wend. 307.)

Plaintiff nonsuit. <sup>6</sup>

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(b) *Is it assignable?*

COOPER v. DEDRICK.

22 BARBOUR (N. Y. SUP. CT.) 516. — 1856.

*By the Court*, MARVIN, J. — The action was upon a guaranty, written upon a promissory note. The note reads thus:—

\$58.26. Due Dedrick & Bronson, or bearer, fifty-eight and twenty-six one hundredths dollars, for value received.

J. S. STILLMAN.

[The guaranty is, that]

For value received, I hereby guarantee the payment of the within note. Feb. 19, 1849.

(Signed by Defendant.)

Upon the trial the plaintiffs produced the note and proved the guaranty written upon it, and rested. [Defendant asked for nonsuit: (1) That there was no evidence of the maker's signature; (2) that plaintiffs showed no title or interest in the guaranty.] <sup>7</sup> The justice gave judgment in favor of the plaintiffs.

Several objections are made to the judgment. It will not be necessary to state them particularly. It was not necessary to prove by witnesses the signature of the maker of the note. This was sufficiently proved, as against the defendant, by proving his execution of the guaranty. (Cowen & Hill's Notes, notes 168, 869, 912.) \* \* \*

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<sup>6</sup> Accord: *M'Doal v. Yeomans*, 8 Watts (Pa.) 361; *Irish v. Cutter*, 31 Me. 536. Contra: *Webster v. Cobb*, 17 Ill. 459; *Donnerberg v. Oppenheimer*, 15 Wash. 290. See 2 Daniel on Neg. Inst., §§ 1774-1784. — H.

[Accord: *Edgerly v. Lawson*, 176 Mass. 551; commented on in 14 Harv. Law Rev. 299. — C.]

<sup>7</sup> Other questions omitted. — H.

As to the evidence of their title to the guaranty, the note was payable to Dedrick & Bronson, or *bearer*, and the guaranty was written upon it. The possession and production of the note was *prima facie* evidence of title in the plaintiffs, and as the guaranty was upon the note, in my opinion, the possession of the note and the guaranty were *prima facie* evidence of right in the plaintiffs to the guaranty. Since the code, the real party in interest is to bring the action. The old question, therefore, whether the form of the contract justifies the action in the name of the plaintiffs, no longer exists; but the question is, has the plaintiff the title or right to the contract or the cause of action? If he has, he may maintain the suit, upon the contract, in his own name. In my opinion, when a guaranty is written upon a note and the note is transferred, nothing being said touching the guaranty, the contract of guaranty passes with the note. In other words, the sale and delivery of the note with the guaranty upon it furnishes *prima facie* evidence of a sale of the contract of guaranty. In the present case the defendant was one of the payees of the note, and the note was also payable to bearer. He transferred the note and guaranteed the payment. In my opinion, any one who should become the holder of the note could maintain an action upon the guaranty, unless it should be shown that the contract of guaranty was not transferred at the time the note was transferred. (See *McLaren v. Watson*, 26 Wend. 425.)

The statute of limitations did not commence running in favor of the defendant until the cause of action accrued upon the contract of guaranty.

The contract of guaranty was not within the statute of frauds. The consideration, "for value received," was sufficiently expressed to satisfy the requirements of the statute. (*Douglas v. Howland*, 24 Wend. 35; *Watson's Ex'rs v. McLaren*, 19 Id. 557.)

The judgment should be affirmed.<sup>8</sup>

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EVERSON *v.* GERE, 122 N. Y. 290. — 1890. A. indorsed and delivered a negotiable promissory note to C., attached to which was an *allonge* containing this guaranty: "For payment received of C., we do hereby guarantee to said C. the payment of the note hereto annexed, etc." (Signed by defendants.) C. indorsed the note to plaintiff "without recourse," and executed and delivered an assignment of the same and the guaranty. In an action by plaintiff against defendants on the guaranty, the trial court granted a nonsuit on the ground that the guaranty was special, personal to C., and did not

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<sup>8</sup> Accord: *Harbord v. Cooper*, 43 Minn. 466; *Phelps v. Sargent*, 69 Minn. 118. — H.



pass to plaintiff, and that no cause of action had accrued on the guaranty at the time of the assignment. *Held*: Error. As the note and guaranty are to be construed together, and as the note is not personal and special, but general and negotiable, the guaranty is also to be regarded as general and will therefore pass by assignment.<sup>9</sup>

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## 5. DEFENSES AVAILABLE TO GUARANTOR.

### PUTNAM *v.* SCHUYLER.

4 HUN (N. Y. SUP. CT.) 166. — 1875.

LEARNED, P. J.:—

Mrs. Henriques, in her lifetime, made two notes to Dr. Allen, the plaintiff's testator. After her death the defendant guaranteed them, by writing under each, as follows:

For value received I hereby guarantee the payment of the above note.

L. W. SCHUYLER.

On the trial the defendant offered to prove that Dr. Allen was the medical attendant of Mrs. Henriques; was in the habit of advising her as to financial and other matters; that she reposed confidence in him in relation to her affairs; together with certain other matters tending to show that the notes were obtained by fraud, and that they were without consideration. The evidence was objected to on the ground that, by executing the guarantee, the defendant had admitted the notes, and was estopped; that the defense of fraud was personal to Mrs. Henriques and her representatives; that the defendant could not impeach the settlement between maker and payee. The evidence was excluded, and the defendant excepted.

I assume, from the manner in which the case is presented, that it was not really claimed on the trial that these matters would not have been competent in behalf of the representatives of Mrs. Henriques. Their exclusion was on the ground that they were not competent in behalf of the guarantor. On this subject, of the right of a guarantor to set up defenses which would undoubtedly be valid in favor of the principal, there is an apparent conflict. But a little discrimination will show that the conflict is only apparent.

First. There is a class of cases in which the owner of a note or bond has assigned it, with a guaranty. In these, it has been held that the guarantor could not show that the instrument was invalid. It would be unjust to permit him to assign an invalid instrument; to

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<sup>9</sup> For the distinction between special (non-assignable) and general (assignable) guaranties, see *Evansville Nat. Bank v. Kaufman*, 93 N. Y. 273; *Sawyer v. Hopgood*, 13 N. Y. St. Rep. 711. — H.

guaranty its payment or collection; to receive the value, and then, when sued on his guaranty, to assert that the original instrument was invalid. He is estopped. (*Remsen v. Graves*, 41 N. Y. 475; *Zabriskie v. C. C. and C. R. R. Co.*, 23 How. [U. S.] 399.) The case of *Mann v. Eckford's Executors* (15 Wend. 502), is of this character. The Life and Fire Company, of which Eckford was president, assigned to the Western Insurance Company a bond and mortgage. Eckford guarantied the bond and mortgage, and the money paid for it, *expressing the amount*. The defendants, his executors, were not allowed to set up usury in the bond and mortgage, against the plaintiff, the receiver of the insurance company.

Second. The guarantor is held liable in those cases in which the debt is justly owing, although, from some defect or incapacity, the principal is not liable in an action. Thus, where the makers of a note were married women, incapable (then) of making a note, the accommodation indorser was still held liable. (*Erwin v. Downs*, 15 N. Y., 576; see *Kimball v. Newell*, 7 Hill, 116.) The guarantor of a lease is liable, although only one of the two lessees executed the lease. (*McLaughlin v. McGovern*, 31 Barb. 208.) In that case, Judge Bacon speaks of this class of cases, mentioning, among others, the guaranty of goods sold to an infant. So the guarantor of a note purporting to be made by two, where the signature of one is unauthorized, is liable. (*Sterns v. Marks*, 35 Barb. 565.) In all these cases the debt is justly owing to the plaintiff; and through no fault of his, he is unable to recover against the principal, or one of the principals.<sup>1</sup>

Third. A guarantor cannot set up, by way of set-off, a claim distinct from that on which he is sued. The right of set-off (that is, as distinguished from a defense arising upon the claim itself) belongs only to the principal debtor, and can be used only at his option. Such is the doctrine of *Gillespie v. Torrance* (25 N. Y. 306), and this is all which that case decides on this point. By indirection, however, it implies that a defense to the claim (as distinguished from a set-off), is available to the guarantor. To the same effect is *Lewis v. McMillen* (41 Barb. 420).

Fourth. But there are still other cases which are not embraced within either of these preceding classes; cases where the plaintiff is the original party to the contract, and therefore has not received it by assignment from the guarantor; where the proposed defense is not the incompetency of the principal to contract; and where it arises

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<sup>1</sup> A guarantor is not discharged merely because the principal has a good personal defense, as coverture, infancy or insanity. *Davis v. Statts*, 43 Ind. 103; *Browning v. Carson*, 163 Mass. 261; *Wiggin's Appeal*, 100 Pa. St. 155; *Lee v. Yandell*, 69 Tex. 34. But a failure of consideration in such a case, as between the principal and plaintiff, discharges the surety. *Baker v. Kennett*, 54 Mo. 82. — H.

out of the contract itself, and not by way of set-off. In these the guarantor has been permitted to make the defense.

He has thus, as to the original contract, been allowed to set up usury (*Morse v. Hovey*, 9 Paige, 197; *Parshall v. Lamoreaux*, 37 Barb. 189); duress of his principal (*Osborn v. Robbins*, 36 N. Y., 365; *Strong v. Grannis*, 26 Barb. 122); partial failure of consideration (*Sawyer v. Chambers*, 43 Barb. 622). And I find no case which intimates that when a person has obtained an obligation from a principal by fraud, he can wipe out the fraud by obtaining a surety to the obligation. Assuming that, in justice and equity, the obligee, by reason of fraudulent acts on his part, has either no claim, or a less claim, against the principal, I see no reason why he should stand in a better position against the guarantor.

The distinction which has been pointed out, viz., that inability on the part of the principal to contract is no defense to the guarantor, while fraud in the contract is, may be found in the civil law. This says that personal defenses do not pass to others, but that defenses, *inherent in the thing*, such as, among others, fraud and duress, are available to sureties. (Dig., 44, 1, *de exceptionibus*, c. 7, § 1; Cod. 2, 24 [23] *de fidejuss*, 2.) "If, in the principal obligation, there is any essential vice which may annul it, as if it has been contracted by force, if it is contrary to law, or to good manners, *if it be founded only on a fraud*, or on some error which may suffice to annul it; in all these cases the obligation of the surety is likewise annulled." (*Strahan's Domat*, bk. 3, tit. 4, § 5, art. 2; *id.*, bk. 3, tit. 4, § 1, art. 10.)

The defendant offered to prove acts of the plaintiff's testator, tending to show that he obtained the notes improperly from the maker; that he took advantage of her confidence in him, and that she did not owe him. If these facts be true, he ought neither to recover of her representatives on the notes, nor of the defendant on her guaranties.

The judgment should be reversed, and a new trial ordered, costs to abide the event.

Present — LEARNED, P. J., BOARDMAN and JAMES, JJ.

Judgment reversed, and a new trial ordered, costs to abide the event.<sup>2</sup>

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<sup>2</sup> Accord: *Bryant v. Crosby*, 36 Me. 562 (fraud); *Swift v. Beers*, 3 Denio (N. Y.) 70 (illegality); *Griffith v. Sitgreaves*, 90 Pa. St. 161 (duress). For an enumeration of the circumstances which will discharge a surety, see Neg. Inst. L., § 201. — H.

## ARTICLE VII.

### DUTIES OF HOLDER: PRESENTMENT FOR PAYMENT.

#### I. Necessity of presentment.

##### 1. NOT TO CHARGE ACCEPTOR OR MAKER.

#### § 130 HARRISBURG TRUST CO. *v.* SHUFELDT.

78 FEDERAL REPORTER, 292. — 1897.

[*Circuit Court, Dist. Washington, N. D.*]

HANFORD, DISTRICT JUDGE. — This is an action to recover a balance due after deducting partial payments upon a negotiable promissory note, made payable on demand. The defendant has demurred to the complaint, his contention being that the same is insufficient, for failure to allege a demand prior to the commencement of the action. There is a rule of long standing, and supported by the weight of authority in this country, that the commencement of an action is itself a demand,<sup>1</sup> and that failure to request payment, prior to the commencement of the action, affords no ground of defense. (*Bank v. Fox*, Fed. Cas. No. 2683; 5 Am. and Eng. Enc. Law, 528z<sup>46</sup> [2d ed. v. 4, p. 351.]).

It is insisted, however, that the courts and the text-books in this country have fallen into error by following early decisions, which were controlled by peculiar facts, and which are insufficient of themselves to establish a general rule upon the subject.<sup>2</sup> It is unwise to depart from business customs and practices which have been sanctioned by repeated decisions of courts, and acquiesced in for a considerable time, and which may fairly be supposed to have been contemplated by the parties at the time of making their contract. This contract must be construed as one having been made subject to the rule above stated, and the maker of the note is, by the terms of his contract, liable without any demand, prior to the commencement of an action.

Demurrer overruled.<sup>3</sup>

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<sup>1</sup> "To say that the suit is the demand is to repeat an unmeaning phrase as thus used, which no number of repetitions can make sensible. A demand note is due forthwith, and hence can be sued without demand." *Wheeler v. Warner*, 47 N. Y. 519, holding that the statute of limitations begins to run from the date of the note. — H.

<sup>2</sup> See 2 Ames' Cases on Bills and Notes, p. 61, note 2. — H.

<sup>3</sup> But a certificate of deposit is not due until demand is made and the certificate returned or tendered. *Shute v. Pacific Nat. Bank*, 136 Mass. 487; *Smiley v. Fry*, 100 N. Y. 262; *McGough v. Jamison*, 107 Pa. St. 336. Contra:

## § 130

## MONTGOMERY v. ELLIOTT.

6 ALABAMA, 701. — 1844.

This action was commenced before a justice of the peace, by the defendant in error, on two notes, for twenty dollars each, in the following form:

The Real Estate Bank, No. 52, of Caledonia, Mississippi. promise to pay John Elliott, or bearer, twenty dollars, on demand, at their banking house, Caledonia, Mississippi. — May 8, 1838.

W. G. WRIGHT, *President*.

R. DOWDLE, *Cashier*.

Judgment being rendered for the defendant, the plaintiff appealed to the circuit court, where judgment was rendered for the plaintiff.

The defendant moved the court to charge, that the plaintiff, to entitle himself to a recovery, must prove a demand at the banking house of the company — which the court refused, and he excepted.

The assignments of error present for revision rejection of the testimony and the charge of the court.

ORMOND, J. — The question, whether a demand was necessary before suit, is one of considerable difficulty. Upon this subject, a great contrariety of opinion formerly prevailed in England, as to the necessity of averring and proving a demand as a precedent condition to the right to recover, when the instrument was made payable on its face at a particular time and place, or where it was accepted, payable at a particular place, which was finally settled on appeal to the House of Lords, that such demand was necessary in the case of *Rowe v. Young* (2 Brod. & Bing. 180).<sup>4</sup>

In the United States a different doctrine has generally prevailed, it being considered matter of defense, and therefore, not necessary to be proved by the plaintiff. (*Wallace v. McConnell*, 13 Peters, 133. See

*Curren v. Witter*, 68 Wis. 16; *Lynch v. Goldsmith*, 64 Ga. 42; *Hunt v. Divine*, 37 Ill. 137; *Tripp v. Curtenius*, 36 Mich. 494. There is also a conflict as to whether bank notes must be presented for payment before suit brought. 3 Am. & Eng. Enc. Law (2d ed.) p. 778. — H.

[On the conflict of authority upon the question whether a demand is necessary to mature a certificate of deposit, and, if necessary, when the demand must be made, see the note to *Elliott v. Capital City State Bank*, 128 Iowa, 275, in 1 L. N. S. 1130. — C.]

<sup>4</sup> This was changed by Onslow's Act (1 & 2 Geo. IV., c. 78) which, as construed, renders presentment unnecessary to charge the acceptor of a bill, drawn payable at a particular place and accepted generally, or drawn generally and accepted payable at a particular place; though not if accepted payable at a particular place only. *Selby v. Eden*, 3 Bing. 611. See Bills of Exchange Act, § 52, and Neg. Inst. L., § 228. The same rule applies to a promissory note. See Bills of Exchange Act, § 87, subsec. (1); *Price v. Mitchell*, 4 Camp. 200; *Exon v. Russell*, 4 M. & S. 507. — H.

also, Chitty on Bills [9 Am. ed.] 393, and Story on Bills, 416; and note, where the cases are collected.)<sup>5</sup>

In this state, it has always been considered matter of defense, when the suit is against the maker or acceptor. The doctrine is so stated by Judge Saffold, in *Irvine v. Withers* (1 Stew. 234); and although it was not acquiesced in by the whole bench, it has been considered and acted on as settling the law from that time to the present. (*Roberts v. Mason*, 1 Ala. Rep. 373.)

The question in this case is, whether the same rule is to be applied where the note is payable on demand at a particular place. We are unable to perceive any substantial difference between the two cases. The same reasons which lead to the conclusion that it is a matter of defense when the note is payable at a specified time, at a particular place, apply with the same force when it is payable on demand.<sup>6</sup> In either case it is impossible that the defendant can be prejudiced, as he can always defend himself by proving that he was ready at the place appointed to pay the debt, and if not ready to pay, why should the plaintiff be required to do an unnecessary act. This question is considered at some length in the case of *Huxture v. Bishop* (3 Wend. 13), and the law considered to be as here stated. The rule would be different where the suit is against an indorser, his contract being conditional to pay, if the maker does not on demand; a demand and notice is, therefore, necessary by the terms of his contract to fix his liability

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<sup>5</sup> See also *Farmers' Bank of Nashville v. Johnson, King & Co.*, 68 S. E. (Ga. Sup. Ct.) 85 (May, 1910). — C.

<sup>6</sup> Accord: *Farmers' Nat. Bank of Annapolis v. Venner*, 192 Mass. 531. At p. 534. Morton, J., says: "It is settled in this state, both at common law and recently by statute [namely, the Negotiable Instruments Law], and by the weight of authority in this country, contrary to the law in England, that, where a note or bill of exchange is payable at a particular time and place, no demand or presentment at the place named is necessary in order to entitle the holder to maintain an action upon the note or bill against the maker or acceptor. *Ruggles v. Patten*, 8 Mass. 480; *Carley v. Vance*, 17 Mass. 389; *Payson v. Whitcomb*, 15 Pick. 212; *Wright v. Vermont Ins. Co.*, 164 Mass. 302. R. L. c. 73. § 87 [N. Y. § 130]. For a collection of cases see Dan. Neg. Instr. (3rd ed.) § 643; 1 Pars. Notes and Bills, (1st ed.) 305 *et seq.*; 4 Am. & Eng. Ency. of Law (2nd ed.) 373. We see no valid distinction between a note payable on time at a particular place and a note payable on demand at a particular place. No demand is necessary before suit, where a note is payable generally on demand, and as we have seen no demand is necessary when a note is payable on time at a particular place. It seems to us that the fact that both circumstances are found in the same note cannot operate to change the rule and render a demand necessary when it would not otherwise be required. *McKenney v. Whipple*, 21 Me. 98; *Gammon v. Everett*, 25 Me. 66; *Haxtun v. Bishop*, 3 Wend. 13; *Montgomery v. Elliott*, 6 Ala. 701; *Dougherty v. Western Bank*, 13 Ga. 287; *Bowie v. Duvall*, 1 Gill & J. 175." This case is reported in 7 A. & E. Ann. Cas. 690, with note entitled "Presentment and demand at place named in note payable on demand as condition precedent to suit against maker." — C.

It results from the view here taken, that there is no error in the judgment of the Circuit Court, and it is therefore affirmed.<sup>7</sup>

## 2. PRESENTMENT NECESSARY TO CHARGE DRAWER OR INDORSER.

§ 130

LONG *v.* STEPHENSON.

[*Reported herein at p. 442.*]<sup>8</sup>

## II. What constitutes sufficient presentment.

### 1. BY HOLDER OR AUTHORIZED REPRESENTATIVE.

§ 132

SUSSEX BANK *v.* BALDWIN.

17 NEW JERSEY LAW [2 HARRISON] 487. — 1840.

DAYTON, J.— This case was tried at the Sussex Circuit of May, A. D. 1838, and verdict had for the plaintiff. Sundry reasons are now relied upon to set the same aside, and I will consider them in their order.

The defendants are the indorsers of a promissory note made by Conrad Teese, Oct. 24, 1836, for five hundred and five dollars and sixty-one cents, payable six months after date to the order of Wm. A. Baldwin & Co. (the defendants), and by them indorsed to the plaintiff. The first reason assigned is, that the note was not duly presented to the maker for payment. That it was presented at an improper place, to wit, the office of Teese, the maker, and by an improper person, to wit, one Dennis, who swears that he acted as the clerk and under the directions of Wm. Tuttle, who was himself merely the agent of James Hedden, the notary public.

As to the place of presentment,<sup>9</sup> the objection may be disposed of very briefly. It is a point not properly arising under the evidence in the case. Dennis, the witness, swears that Teese, the maker of the note, told him, Dennis, to present his notes for payment at that place, and that he had been in the habit of doing so. This estops

<sup>7</sup> See for a full discussion of the authorities, *Montgomery v. Tutt*, 11 Calif. 307. The American cases have almost uniformly held that presentment of a bill or note payable at a particular place is unnecessary in order to maintain an action against the acceptor or maker; an omission to do so merely stops interest and damages in case the acceptor or maker was ready at the time and place to pay. *Hills v. Place*, 48 N. Y. 520; *Cox v. National Bank*, 100 U. S. 704, 713; *Eldred v. Hawes*, 4 Conn. 465; *Carley v. Vance*, 17 Mass. 389. — H.

<sup>8</sup> See §§ 143–144. — H.

<sup>9</sup> See § 133. — H.

Teese from objecting to the place of presentment; and that which is good against the drawer, is good against the indorser. (*State Bank v. Hurd*, 12 Mass. 172; *Whitwell v. Johnson*, 17 Mass. R. 449.) But it is thought advisable that this point be put at rest in this State by an expression of opinion by this court.

It appears by the evidence that the office in question was the regular place of business of the maker; and I have no doubt where a person has an office or a known and settled place of business for the transaction of his moneyed concerns—whether he be a banker, broker, merchant, manufacturer, mechanic, or dealer in any other way, a presentment and demand at that place (as well as a presentment and demand at his residence), is good in law. It must not, however, be a place selected and used temporarily for the transaction of some particular business, as settling up some old books or accounts merely, but his regular and known place of business for the transaction of his moneyed concerns. The counting room of a banker or merchant may be a proper place for a demand, though the manufactory or workshop would not. Yet if the manufacturer or mechanic have an office, or known place of business for the purpose aforesaid, a good demand may be made there. (*Bank of Columbia v. Lawrence*, 1 Peters, 582; *Williams v. The Bank of United States*, 2 Peters, 100; *Byles on Bills*, 118; *State Bank v. Hurd*, 12 Mass. 173.)

Nor is there anything in the objection that the presentment was made by an improper person. It appears by the evidence that Tuttle did the business of Hedden, the notary public, and it must have been with the consent and knowledge of the bank that he employed and directed Dennis, who was his clerk, to present the note in question to the drawers, and put him in possession of the note for that purpose. If the note had been paid on presentment, he could and would have delivered it up to the drawers, and that would have exonerated them from further liability. An authority to make a demand, may be created by parol, and the mere possession of the paper, is evidence enough of such authority. (3 Kent. C. 108; *Bank of Utica v. Smith*, 18 J. R. 230; *Shea v. Brett*, 1 Pick. 401; *Morris v. Foreman*, 1 Dal. 193; *Freeman and others v. Boynton*, 7 Mass. 487.)

There is an impression current in some degree, even with the bar, that a presentment of a note must be by a notary, or at least on his behalf, and that he must protest it upon non-payment, before the indorser is liable. But this is not so.<sup>1</sup> The record of a demand and notice, etc., by a notary, entered in his book, according to our statute, of 21st February, 1829, Harr. C. 249, may serve to refresh his memory, or in case of his absence or death it may be used as evidence of the facts contained in it; but such demand and protest by a notary are not essential to a recovery against the indorser. It

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<sup>1</sup> See § 189. — H.



was not so by the common or commercial law, nor is it required by our statute. If a notary act in the premises, and make the protest, although sanctioned by general custom, it is not strictly an official act. (*Nichols v. Webb*, 8 Wheat. 326; 3 Kent C. 93-4; 1 Saund. on Pl. & Ev. 295.)

Any person may present at its maturity, a promissory note of which he is put in possession, and if paid in the ordinary course of business, and taken up, the payment is good; and if not paid, the demand is good as a ground work for notice to the indorsers, and that without any protest.<sup>2</sup> The rule is otherwise as to foreign bills of exchange, which must be protested by a notary, and their official seal is plenary evidence in all foreign courts and countries, of the dishonor of the bill (*vide* cases above cited).

2. The next objection, is to the notice to the indorsers.<sup>3</sup> The name of James Hedden, the notary public, was *printed* at the foot of the notice, not written; and this is assigned for error. There is nothing in this objection. The law prescribes no form of notice, its object is merely to appraise the party of the non-payment—to put him upon inquiry, that he may protect his rights. This is as well done by a notice with a printed as with a written name.

The signature of the notary would carry with it in a large majority of cases no higher degree of certainty than the printed name; for it must in most cases be unknown to those to whom notices are sent. The notice in this case came from a proper source, and stated the proper facts; that is enough. It is needless to cite authorities upon this point.

[The learned judge then decides that the notice was sent in due time, and that there was no usury. NEVINS, J., dissented on the last point.]

Rule made absolute.<sup>4</sup>

<sup>2</sup> *Baer v. Leppert*, 12 Hun (N. Y.) 516. — H.

<sup>3</sup> See § 166. — H.

<sup>4</sup> The drawer may provide in the instrument that it shall not be presented by a specified person. *Com. Nat. Bk. v. First Nat. Bk.*, 118 N. C. 783. — H.

[In *Farmers' Bank v. Johnson, King & Co.*, 68 S. E. (Ga.) 85, it was held that where a check was drawn on a bank located in another town than that in which the drawer resided, and immediately following the direction to the drawee bank there were stamped, at the time when the check was drawn, the words, "Payable through [a named bank in another city of the same state] at current rate," this was a material part of the direction; and the drawee bank was not required to pay the check when not presented through the bank thus named, but directly by a third bank. — C.]

2. AT THE PROPER TIME.<sup>5</sup>

## § 131

JOHNSON *v.* HAIGHT.

13 JOHNSON (N. Y.) 470. — 1816.

ACTION by holder against indorsers.

SPENCER, J., delivered the opinion of the court.

On the second point, the defendants are entitled to judgment. The third day of grace fell on the 29th day of November, and payment was not demanded of the maker until the 30th. The law is perfectly settled, that a note must be demanded on the third day of grace, unless that falls on Sunday, and then it must be demanded on the second day of grace. (2 Caines, 343; 16 East, 250.) Here there is no excuse for delaying the demand on the maker, and there is a palpable want of due diligence, which discharges the indorser.

Judgment for the defendant.<sup>6</sup>§ 131 COMMERCIAL NATIONAL BANK *v.* ZIMMERMAN.

185 NEW YORK, 210. — 1906.

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered June 5, 1905, affirming a judgment in favor of defendant Zimmerman entered upon a decision of the court on trial at Special Term.

The plaintiff brought this action to foreclose a lien on certain bonds of a railroad company, which it had held as collateral security for the payment of a note of the defendant, the Syracuse Construction

<sup>5</sup> See also the cases on the presentation of checks for payment under Neg. Inst. Law, § 322, *post*. — C.

<sup>6</sup> See *Hart v. Smith*, 15 Ala. 807. See § 145, which abolishes days of grace. Paper payable without grace falling due on a legal holiday is payable on the next succeeding business day. *Salter v. Burt*, 20 Wend. (N. Y.) 205.

[See Professor Williston's article entitled "An Ambiguity in the Negotiable Instruments Law," in 23 Harv. Law Rev. 603-607, *post*, p. —. — C.]

See § 146. Days are reckoned exclusive of the day of date; exclusive of the day of sight; and, where grace is allowed, exclusive of the nominal day of payment. *Ammidown v. Woodman*, 31 Me. 580; *Roehner v. Knickerbocker Co.*, *infra*.

Months in bills and notes are reckoned as calendar months according to the portion of the calendar covered by the instrument. Thus, a note dated January 30, due one month from date, without grace, is due on February 28, except in leap-year, when it is due on February 29. A similar note dated February 28 is due on March 28. *Wagner v. Kenner*, 2 Rob. (La.) 120; *Roehner v. Knickerbocker Co.*, 63 N. Y. 160. — H.

Co., indorsed by Joseph Zimmerman, and to recover a judgment for any deficiency, arising upon the sale of the bonds, against Zimmerman's estate. The note reads as follows:

"\$10,000

SYRACUSE, N. Y., Sept. 16, 1899.

"On demand after date we promise to pay to the order of Joseph Zimmerman ten thousand dollars at Commercial Bank. Value received with interest.

"SYRACUSE CONSTRUCTION CO.

"per J. S. KAUFMANN, *Treas.*"

Upon the trial of the issue, which was had without a jury, the trial judge found, as the facts of the case, that the note was indorsed by Zimmerman, without consideration and for the accommodation of the maker; that on September 20, 1899, the plaintiff discounted the note for the maker, the defendant construction company, receiving the bonds of the railroad company as collateral security for its payment; that, in January, 1903, Zimmerman died intestate and his widow, this defendant, was appointed his administratrix; that on April 9, 1903, the note was presented to the maker for payment and, payment being refused, was duly protested for nonpayment; that "said note was not presented within a reasonable time after it was issued and that said plaintiff did not demand the payment thereof, or give notice of the dishonor thereof, within a reasonable time." Upon these facts, he reached the legal conclusion that the plaintiff was entitled to enforce a lien upon the bonds by the sale thereof; but that, as the "presentment of said note was not made within a reasonable time after the discount," the indorser, Zimmerman, and his estate were released from all liability thereon. Upon the plaintiff's appeal from so much of the judgment thereupon entered, as adjudged that it was not entitled to judgment against the estate of the indorser for the deficiency upon a sale of the bonds, the Appellate Division, in the fourth department, by unanimous vote, affirmed the judgment as rendered. The plaintiff now appeals to this court.

GRAY, J. The only question of importance, which this appeal presents, is of the correctness of the decision that the presentment of the note for payment had not been made by the plaintiff within a reasonable time. That must, necessarily, turn upon the effect of the enactment of the provisions of the Negotiable Instruments Law of 1897. (Laws of 1897, chap. 612.) Section 131 of that law provides that, where the instrument "is payable on demand, presentment must be made within a reasonable time after its issue, except that in the case of a bill of exchange, presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof." By section 4, it provided that "in determining what is a 'reasonable time,' or an 'unreasonable time,' regard is to be had to the nature of the instrument, the usage of trade or business (if any) with respect to such instruments, and the facts of the particular case."

Prior to this legislative enactment, the decision of this court in *Merritt v. Todd*, (23 N. Y. 28), was regarded as having settled the rule of law applicable to the determination of such cases. In that case, the note was payable on demand, with interest, and the question arose as to the continuance of the indorser's liability, where three years had intervened between the making and presentment for payment. Chief Judge COMSTOCK, with the concurrence of the majority of the judges, undertook to resolve what he regarded as the existing uncertainty as to the rule, which conflicting decisions had brought about, by referring the interpretation of the contract to the adoption of one of two principles. By the one principle, a promissory note, payable on demand with interest and indorsed, is to be regarded as a continuing security and no dishonor attaches until payment is required and refused. By the other, or opposing rule, the holder, if he wishes to charge the indorser, must make his demand of the maker without delay. Judge COMSTOCK finds no intermediate ground to stand upon and holds "that questions of this kind ought to be determined according to one of the two rules which have been mentioned; in other words, that the demand may be made in due season at any time so as to charge the indorser, or else that he is discharged unless it be made with due diligence, in the general sense of the commercial law. Between these alternatives, we are to select the one which will best harmonize with the language of the contract and the intention of the parties. A demand note may be payable with or without interest. If the security be not on interest, it may be a fair exposition of the contract to hold that no time of credit is contemplated by the indorser, and that the demand should be made as quickly as the law will require upon a check or sight-draft \* \* \* But \* \* \* we think that a note payable on demand with interest is a continuing security, from which none of the parties are discharged until it is dishonored by an actual presentment and refusal to pay. \* \* \* If the parties declare in the written instrument, which is the only evidence of their agreement, that the money shall be paid on call, with interest in the meantime, a productive investment of the sum for some period of time is plainly intended. What, then, is that period? The only answer which can be given is, that it is indefinite or indeterminate, and ascertainable only by an actual call for the money; and if that be the meaning of the principal parties, the indorser must be deemed to lend his name to the contract with the same intention. \* \* \* We see no good reason why a note, like the one now in question, should not be construed precisely according to its terms and, if we follow that construction, such instruments are not dishonored by the mere effluxion of time." Although the decision in *Merritt v. Todd* was subsequently discussed and, in some cases, criticised, its authority was not shaken as establishing a rule of law and it was expressly followed as late as in *Parker v. Stroud*, (98

N. Y. 379). (See *Herrick v. Woolverton*, 41 N. Y. 581; *Pardee v. Fish*, 60 ib. 265; *Crim v. Starkweather*, 88 ib. 339.) Judge COMSTOCK followed the doctrine of the English courts, in differentiating notes payable on demand with interest, from those payable on demand merely. He sought to give effect, in the former case, to what seemed to be an intention of the parties that, notwithstanding the terms, there should be no immediate demand, and that the time of payment should be future; thus making the instrument a continuing obligation.

The law being thus settled in this state, the Negotiable Instruments Law was passed, in 1897, as the outcome of a general movement to bring about a uniform law in this country, covering the subject of "Bills and Notes." It was a codification of the law and, in the respect which we are considering, it modified the rule as formulated in *Merritt v. Todd*. It established one rule, which was to be applicable to all cases, that where an instrument "is payable on demand, presentment must be made within a reasonable time after issue." No distinction was to be made, as theretofore, when the instrument was an interest-bearing obligation. While, therefore, it must be regarded as changing the rule upon the subject of the time for the presentment of such instruments, by placing them upon the same footing, the fourth section of the law has to be given effect; which requires, in determining what is a reasonable time, a consideration to be had of the nature of the instrument, any usage of trade and the facts of the particular case. That would, certainly, be sufficient to authorize the differentiation of bills, or promissory notes, from other instruments for the payment of money; but, even where it is a question of the time within which a demand note must have been presented, the facts and circumstances of the case must be regarded. If a note is payable on demand, it is always mature and may at any time be demanded. The statute of limitations commences to run against the maker from its issue. (*Herrick v. Woolverton*, 41 N. Y. 587.) After its issue, what constitutes reasonableness of time for its presentment cannot be determined by any fixed rules; for, plainly, the particular circumstances may be such as to evidence some intention of the parties as to its continuance. And, certainly, they may be sufficient to justify an inference of unreasonable delay. In my opinion, what the legislature intended to accomplish by the provisions of the Negotiable Instruments Law, in question, was to do away with the distinction between notes, or bills, payable on demand, which *Merritt v. Todd* had created, and to leave the question of their reasonable presentment for payment, in order to charge the parties to them, as one for the determination of the court upon the facts. That question, if the facts were unsettled and the testimony was conflicting, might be a mixed one of law and fact, which the jury should decide, under the instructions of the court as

to the law; but, where they are ascertained and are not in dispute, the question is one of law. (*Aymar v. Beers*, 7 Cowen, 705, 709; *Mohawk Bank v. Broderick*, 10 Wend. 304, 308; *Carroll v. Upton*, 3 N. Y. 272; *Hunt v. Maybee*, 7 ib. 266, 272.) In the present case the defendant offered no evidence and there was no dispute about the facts. The trial judge had before him the facts of the discount of a demand note, bearing interest; that the indorsement by Zimmerman was without consideration and for the maker's accommodation; that its payment was secured by the deposit of certain securities; that notwithstanding that, some two years after the making of the note the plaintiff had complained to Zimmerman of its non-payment and twice, a year later, had written that the maker was in default as to the interest, no steps were taken to charge the indorser, by presentment of the note for payment and by protest for non-payment, until more than three and a half years had elapsed. If the finding that the note was not presented within a reasonable time depended for its justification upon the evidence, we should be, undoubtedly, concluded from reviewing it by the rule of unanimous affirmance. But viewing it, as I think we must, as a question of law to be decided by the court upon the ascertained facts, it depended upon the interpretation of the statute as applied to the facts and, in my opinion, the decision of the trial court was correct.

It is argued by the appellant that the defense, that the note was not presented within a reasonable time after its issue, was one which should have been specially pleaded in the answer. This objection was not taken upon the trial; but, assuming that it could properly be raised upon the appeal, it is untenable. The burden is on the holder of a note, when seeking to charge an indorser, to prove due and timely presentment and the giving of notice to the indorser of its dishonor. The obligation of the indorser is conditional upon all the steps having been taken by the holder, which the statute has prescribed as to presentment and as to notice of non-payment, etc. The Negotiable Instruments Law is the codification of the law merchant upon the subjects treated and, in setting forth what is required of the holder of a note, it casts upon him the burden to prove that the requirements were all complied with. They were necessary conditions of his right to recover. Presentment of a demand note within a reasonable time is a requirement of the statute and the liability of the indorser to make good the contract of the maker, unlike that of a guarantor, is conditional and depends upon the holder's having made a case under the statute of an obligation, which he has caused to mature and, by appropriate legal steps, to become an indebtedness of the contracting parties. (*Brown v. Curtis*, 2 N. Y. 225.) Therefore, I think it would be incorrect to hold of this defense that it is of an affirmative nature and, like the defense of usury, or any other defense which avoids an obligation, that it must be pleaded to be available.

No other question demands consideration and, for the reasons given, I advise the affirmance of the judgment, with costs.

CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, WILLARD BARTLETT and CHASE, JJ., concur; VANN, J., concurs in result.

Judgment affirmed.<sup>7</sup>

## § 131

### PARKER v. REDDICK.

65 MISSISSIPPI, 242. — 1887.

ON Sept. 22, 1884, W. J. Parker bought from Snider & Son an instrument as follows:—

BANKING HOUSE OF M. C. SNIDER & SON, GRENADA.

\$200.00

GRENADA, MISS., Sept. 22, 1884.

Pay to the order of W. J. Parker, two hundred dollars.

J. B. SNIDER, *Cashier*.

TO LATHAM, ALEXANDER & Co., New York, N. Y.

No. 50,665.

On the same day Parker indorsed this instrument and forwarded it to F. M. Lamon, Brooksville, Florida. On October 1, 1884, Lamon indorsed it to J. M. Reddick. On Oct. 3, 1884, Reddick indorsed it to A. N. Chelf. On Oct. 13, 1884, Chelf indorsed it to Hancock & Edrington, who indorsed it to Witz, Biddle & Co., who indorsed it to the Union Bank of Baltimore, who indorsed it to the "Republic" Bank of New York, who, on Oct. 21, 1884, presented the same for payment, which was refused on the ground that Snider & Son had no funds in the hands of the drawees. The instrument was duly protested, and notice was forwarded to the indorser Parker, at Grenada, Miss., and also to the other several indorsers. All the indorsers of the paper in question resided in the town of Brooksville, Florida, except Witz, Biddle & Co., and the two banks referred to; and it was held in that town until the indorsement to Witz, Biddle & Co., who resided in Baltimore, Md. There were daily mails from Brooksville by which a letter could reach New York in five days.

J. M. Reddick, one of the indorsers, as well as an indorsee, after having paid the amount of the check or bill of exchange to his indorsee, brought this action against J. B. Snider, surviving partner of Snider & Son, and W. J. Parker, to recover the value of said instrument.

On the first trial the jury found for the defendants. This verdict was set aside by the court. On the second trial the jury found for the plaintiff. The defendant, Parker, appealed from the judgment of the court.

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<sup>7</sup> See also *Turner v. Iron Chief Mining Co.*, 74 Wis. 355, and *Leonard v. Olson*, 99 Iowa, 162. — C.

ARNOLD, J., delivered the opinion of the court.

It is uncertain from the evidence whether the drawees of the instrument upon which appellants were sued were bankers or not; but whether the paper be called a check or bill of exchange, it expressed no time for payment, and was, therefore, payable on demand. A bill or check, payable on demand, must be presented for payment within a reasonable time. What constitutes reasonable time in such case, is a question of law to be determined by the court, when the facts are ascertained. (*Baskerville v. Harris*, 41 Miss. 535.)

No delay in making presentment of paper payable on demand, can be termed reasonable, if it is more than is fairly required, in the ordinary course of business, without special inconvenience to the holder, or by the special circumstances of the case. (*Phoenix Ins. Co. v. Gray*, 13 Mich. 191.) Such paper contemplates immediate payment. It cannot be said that it is intended for circulation. One who holds a bill or check payable on demand, beyond the time necessary, in the usual course of business, for its presentation for payment, does so at his peril. The general rule, derived from the authorities, but subject to modification by special circumstances, is, that if the drawee of such paper, resides in a different place from that in which it is drawn, and the instrument must be sent by mail for presentment, it must be mailed on the day next after that on which it was received by the holder. (1 Danl. on Neg. Inst., § 605; 2 id., §§ 1586, 1592; Byles on Bills [7th Am. ed.], 211, 212, 213; Chitty on Bills [13th Am. ed.], 433; *Fortner v. Parham*, 2 S. & M. 151.)

Paper payable on demand, while not commonly intended for that purpose, may be put into circulation; but its ultimate presentment for payment cannot be delayed beyond a reasonable time, by transfer or successive transfers, any more than it can by being locked up, or held an unreasonable time, by the first or any subsequent holder. (Chitty on Bills [13th Am. ed.], 430; 2 Daniel on Neg. Insts., § 1595; Story on Prom. Notes, § 494.)

If the paper sued on be regarded as a bill, the drawer, as well as the indorsers, would be discharged by the negligence and delay in respect to the presentment; but, if a check, indorsers would be discharged by such laches, while the drawer would not, unless he could show that he was injured by the default. He would be entitled only to such presentment and notice as would save him from loss. (2 Daniel on Neg. Insts., § 1587.)

No excuse is shown by the record for the delay which intervened in presenting the paper in question for payment, and the loss thereby occasioned cannot be imposed on the indorser, Parker. As to him, the last verdict was contrary to the law and the evidence. The court below erred in instructing the jury that the presentment was made within a reasonable time, and in refusing to instruct the jury to the contrary. The judgment is affirmed as to the drawer, Snider, who



made no defense below and assigns no error here; but it is reversed as to the indorser, Parker, and the last verdict as to him is set aside, and the first verdict as to him is restored, and judgment rendered thereon, here, in his favor.<sup>8</sup>

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§ 131 COLUMBIAN BANKING COMPANY *v.* BOWEN.

134 WISCONSIN, 218. — 1908.

JUNE 10, 1903, the banking firm known as the Farmers' & Merchants' Bank, of Bangor, Wis., sold to the defendant a \$400 draft, dated on that day, payable to defendant's order, and drawn by such firm on the National Bank of North America, at Chicago, Ill. The draft was sent to the defendant at Barron, Wis., and was indorsed by him to A. R. Tabbert, to whom it was forwarded by mail, at Spokane, Wash., June 16, 1903, and was there received by him June 20th thereafter. He was at Spokane temporarily and was on his way to the city of San Francisco, Cal. July 14, 1903, he indorsed the draft and sold the same to the plaintiff at such city, receiving \$400 therefor. On that day, in due course, plaintiff sent the draft by mail to the Bankers' National Bank, of Chicago, Ill., by which it was received July 18th thereafter, and was then, as requested, duly presented to the drawee for payment, which was refused, whereupon it was duly protested for nonpayment by a duly authorized notary public, who forwarded a manifest thereof with notices of protest for A. R. Tabbert, the plaintiff and the defendant, to the plaintiff at San Francisco, Cal., and also sent due notice to the National Bank of North America at Chicago, Ill., and to the drawer at Bangor, Wis., July 19, 1903. Plaintiff upon receipt of the manifest and notices duly sent the one for defendant to him at Barron, Wis., by whom it was duly received, and sent the one for Tabbert by mail to his post-office address and reputed place of residence, that being San Francisco, Cal. Thereafter due demand was made on defendant for payment of the draft, and the same was refused. July 28, 1903, the property of the drawer was placed in the possession of a receiver, who duly paid upon the draft \$144.49, January 6, 1904, \$61.93, May 20th thereafter, and \$30.96, June 5th following. Plaintiff was the owner of the draft at the time of the commencement of the action, and at the time of the trial thereof there was due thereon \$210.

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<sup>8</sup> A note indorsed when overdue must be presented within a reasonable time. *Light v. Kingsbury*, 50 Mo. 331, *ante*. p. 97.

For presentment for acceptance, see § 241. For presentment of checks see § 322. The Negotiable Instruments Law has abolished the distinction between bills payable on demand and bills payable at sight. See § 26.

See on reasonable and unreasonable delay, 2 Ames' Cases on Bills and Notes, 277, note. — H.

The pleadings presented issues for decision involving facts as above detailed. The case was tried by the court resulting in findings of fact in accordance with the statement, and a conclusion of law that plaintiff became the owner of the draft in due course, and was entitled to judgment for \$210, with costs. Judgment was accordingly rendered.

MARSHALL, J. (after stating the facts as above). Counsel for appellant have presented quite an extended argument, referring to many authorities, as to the law antedating and independently of the negotiable instrument statute (chapter 356, p. 681, Laws 1899) to support the proposition, that appellant was released from liability on the instrument in question, because of the period intervening between his parting therewith and the presentation thereof to the drawee for payment. Such statute was enacted for the purpose of furnishing, in itself, a certain guide for the determination of all questions covered thereby relating to commercial paper, and, therefore, so far as it speaks without ambiguity as to any such question, reference to case law as it existed prior to the enactment is unnecessary and is liable to be misleading.

The Negotiable Instruments Law is not merely a legislative codification of judicial rules previously existing in this state making that written law, which was before unwritten. It is, so far as it goes, an incorporation into written law of the common law of the state, so to speak, the law merchant generally as recognized here, with such changes or modifications and additions as to make a system harmonizing, so far as practicable, with that prevailing in other states. That it contains some quite material changes in previous rules governing commercial paper we have had occasion heretofore to point out. *Hodge v. Smith*, 130 Wis. 326; *Aukland v. Arnold*, 131 Wis. 64.

The primary question discussed by appellant's counsel, it is believed is fully covered by the Negotiable Instruments Law. There are a multitude of decisions regarding the character of a bill of exchange and that of a check, as those terms are used in business transactions, and to what extent the incidents of one are identical with those of the other, which decisions are so variant in their phrasing of the matter as to produce more or less confusion in respect thereto with many apparent, and some real, conflicts, to remedy which was one of the principal objects of the law.

To that end it was provided in section 1680,<sup>9</sup> "A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to order or bearer," and it was further

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<sup>9</sup> N. Y. § 210. — C.

provided in section 1684-1,<sup>1</sup> "A check is a bill of exchange drawn on a bank, payable on demand."

As to whether the incidents of the species of bills of exchange last mentioned are the same as those of bills of exchange generally, it was further provided in the section last referred to, "Except as herein otherwise provided, the provisions of this act applicable to a bill of exchange payable on demand apply to a check." The only exception referred to material to this case is contained in section 1684-2,<sup>2</sup> in these words: "A check must be presented for payment within a reasonable time after its issue or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay."

Keeping in mind that the discharge from liability above referred to because of unreasonable delay after the issuance of a check in presenting it for payment, is of the drawer only, and that this action is against the payee who indorsed the instrument in question without qualification and put it in circulation, we turn to section 1678-1,<sup>3</sup> which provides, as to a bill of exchange payable on demand, which from the foregoing obviously includes a check or draft on a bank of the character of the one in question, "presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof."

From the foregoing it seems plain that as regards the payee of such an instrument as we have here, who puts the same in circulation with his unqualified indorsement thereon, and all subsequent parties thereto so indorsing the same, presentment for payment is sufficient, as regards their liability, if made within a reasonable time after the last negotiation. A bill of exchange payable on demand, regardless of its character, put in circulation, so long as its circulating character is preserved may be outstanding without impairing the liability of indorsers thereof. Formerly the length of time within which a bill of exchange might circulate without impairing such liability was more or less uncertain, rendering it very difficult to determine any one case by the decision in another. That difficulty was removed, so far as practicable, by the provision that only the time need be considered intervening between the last negotiation and the presentment. That is recognized as a radical change in the law as it formerly existed. Section 195, Selover's Negotiable Instruments Law.

As to an ordinary bill of exchange put in circulation, it was quite anciently held that the period between July 18th of one year and January 16th of the next year was not necessarily unreasonable. *Gowan v. Jackson*, 20 Johns. (N. Y.) 176. Perhaps one might now keep a bill of exchange for such length of time as to destroy its

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<sup>1</sup> N. Y. § 321. — C.

<sup>2</sup> N. Y. § 322. — C.

<sup>3</sup> N. Y. § 131. — C.

circulating character notwithstanding he ultimately passed it along to another person, but that situation, as we view the case, does not exist here.

Applying the law as aforesaid to the facts of this case it is readily seen that the delay in presenting the paper for payment between its date and the negotiation to the bank at San Francisco is immaterial. Appellant unqualifiedly indorsed the paper and put it in circulation by sending it to Tabbert at a distant part of the country, probably knowing that he was a traveler. Tabbert received the paper while journeying with the intention of going to San Francisco and held it till he arrived there and then negotiated it. It was promptly presented for payment thereafter and so in time, as regards that circumstance, to preserve the liability of appellant.

The court decided, as indicated, that Tabbert was a traveler with San Francisco as his destination and properly held that such circumstance sufficiently explained, if any explanation were necessary, the lapse of time between his reception of the paper and his negotiation thereof, preserving its circulating character and warranting the finding that the respondent came thereby in due course.

The point is made that the instrument was not presented to the drawee for payment during banking hours. The Negotiable Instrument Law at section 1678-2,<sup>4</sup> provides that "Presentment for payment to be sufficient, must be made: \* \* \* at a reasonable hour on a business day. \* \* \*" The evidence shows that the paper, after taking its course through the clearing house, was presented to the drawee for payment on the afternoon of the same day between the hours of 3 and 6 o'clock. The proof is to the effect that such was the customary way of doing such business in Chicago, where the drawee was located. That is, as we understand it, that the business day of the bank continued after the closing of the clearing house transactions so as to enable banks holding paper for collection, refused recognition in such transactions, to be presented for payment as was done in this case. That satisfies the statute. What constitutes business hours of a bank, within the meaning of the statute, has reference to the general custom at the place of the particular transaction in question. In case of a transaction occurring in a foreign jurisdiction, as in the instance in question, the court cannot take judicial notice of what constitutes reasonable hours on a business day. Daniel on Negotiable Instruments (5th ed.) § 601. It is a matter of proof, though in case of the notarial certificate of the transaction, as here, being regular so as to furnish *prima facie* proof that the paper was duly presented for payment, that raises the presumption that the pre-

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<sup>4</sup> N. Y. § 132. — C.

sentment was made at a proper time. *Cayuga County Bank v. Hunt*, 2 Hill (N. Y.) 635.

Judgment affirmed.<sup>5</sup>

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§ 131

ROBINSON v. AMES.

[Reported herein at p. 633.]

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§ 132

FARNSWORTH v. ALLEN.

4 GRAY (MASS.) 453. — 1855.

ACTION by holder against indorser. Defense, presentment and demand insufficient. Verdict for plaintiff. Defendant alleges exceptions.

The agent of the holder did not know the maker's place of residence. After inquiring it, he gave the note to a notary, who went to the house of the maker and arrived there about nine o'clock in the evening. The maker and his family had retired for the night, but the maker answered the bell, and, upon the note being presented, refused payment.

BIGELOW, J. — The note declared on, not being payable at a bank, or at any place where business was transacted during certain stated hours in each day, was properly presented to the maker at his place of residence. It was also the duty of the holder to present it within reasonable hours on the day of its maturity. No fixed rule can be established by which to determine the hour beyond which a presentment, in such case, will be unreasonable, and insufficient to charge an indorser. Generally, however, it should be made at such hour that, having regard to the habits and usages of the community where the maker resides, he may be reasonably expected to be in a condition to attend to ordinary business. In the present case, taking into consideration the distance of the place of residence of the maker from Boston, where the note was dated, and where it was held when it became due; the means that were taken to ascertain the residence of the maker, and the season of the year at which the note fell due, we are of opinion that a presentment at nine o'clock in the evening was seasonable and sufficient. It is quite immaterial that the maker and his family had retired for the night. The question whether a presentment is within reasonable time cannot be made to depend on the private and peculiar habits of the maker of a note, not known to the holder; but it must be determined by a consideration of the circumstances which, in ordinary cases, would render it seasonable or

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<sup>5</sup> See also *Plover Sav. Bank v. Moodie*, 135 Iowa, 685, *post*, under § 322. — C.

otherwise. (*Barclay v. Bailey*, 2 Campb. 527; *Triggs v. Newnham*, 10 Moore, 249, 1 Car. & P. 631; *Wilkins v. Jadis*, 2 B. & Ad. 188; *Cayuga County Bank v. Hunt*, 2 Hill [N. Y.], 635.)

Exceptions overruled.<sup>1</sup>

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§ 135 NEWARK INDIA RUBBER MFG. CO. v. BISHOP.

3 E. D. SMITH (N. Y. CITY C. P.) 48. — 1854.

ACTION by holder against two indorsers. Judgment for plaintiff. Defendants move for a new trial, which is granted as to Griffin, but denied as to Bishop. Bishop appeals.

The note was payable at the Bowery Bank. On the day of maturity Bishop left his check with the teller to take up the note. The note was not presented during banking hours and at the close of banking hours the teller left the bank having the check still in his custody. After banking hours the note was presented to a clerk who was at the bank and who examined the ledger and said there were no funds. Due notice was given.

At the trial the jury were instructed as follows:

“If funds were provided and set apart to pay the note, and if it was not paid for the reason that the note was not presented for payment in the usual business hours of the bank, the indorsers are discharged.

“A presentment of the note for payment at the bank, but not within the usual business hours, to a clerk who could not pay the note, is not a good presentment which will hold the indorser.

“It is not enough that the clerk to whom at such a time the presentment is made, have power to bind the bank to pay the note by certifying in writing on the note that it is good.

“In order to make a presentment at such a time, a sufficient one, the person to whom it is made must have the power to pay the note and take it up, by actual payment to its holder of funds that are provided in the bank for that purpose.”

WOODRUFF, J. — I did not feel called upon to order a new trial in this case in favor of the appellant Bishop, who had himself withdrawn the money provided to meet the note. He knew that the maker would not pay the note as early as the morning of the day it became due, for he had himself undertaken to provide funds for its payment. On learning that the note was not presented till after business hours, he himself takes the money which had been set apart for the use of the plaintiff, and appropriates it. Under such circumstances, the jury having rendered a verdict against him on the trial,

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<sup>1</sup> Compare *Dana v. Sawyer*, 22 Me. 244, holding the hour unreasonable. — H.

I did not think, and I do not now think, that the court should set that verdict aside as against evidence for his benefit, and to enable him to keep that money, when he has not been in any manner or by any possibility injured by any defect in the presentment.

The case of the defendant Griffith is very different. It is an undisputed fact that if the note had been presented at the bank within the usual business hours it would have been paid. It is equally clear that at the time the note was presented, there was no person in the bank who could pay it. The undertaking which the note and its indorsements imported was, that there should be at the bank during the usual hours of business on that day, funds in the hands of proper persons competent to pay them over, sufficient and ready to meet that note. Not that every person who might be employed about the bank, from the president down to the porter, and who might happen to be in the bank after it was closed, should at all hours, so long as the door was unlocked, be ready to pay the note.

I do not question that there may be a good presentment at bank after banking hours, by which I mean after the hour until which banks are open for the purpose of paying notes which may be presented. But I think that he who delays presentment until after that hour takes the risk of finding at the bank a person who can pay the note if the funds are provided, or who is authorized to refuse if they are not.

The case of *Garnett v. Woodcock* (1 Stark. 475), which has been referred to in support of the sufficiency of this presentment, proceeds upon the distinct ground that if a banker appoint a person to attend in order to give an answer, a presentment would be sufficient if made before 12 o'clock at night, and that in that case it did not appear but the person was stationed there for that express purpose; while the general rule that presentment must be made within the usual hours, is not at all repudiated but rather affirmed by that same case. And see *Parker v. Gordon*, 7 East, 385; *Barclay v. Bailey*, 2 Camp. 527; *Wilkins v. Fadis*, 2 B. & A. 188; *Elford v. Teed*, 1 M. & S. 88; *Bank of Utica v. Smith*, 18 J. R. 230.)

In this case it does affirmatively appear that the person to whom the presentment was made was not stationed there to give an answer. The funds were there, but he could not pay the note. Had he known that the funds were there, provided for the express purpose, still he could not pay the note, so that it was by reason of the omission to present within the usual hours, and for that cause alone, that the note was not paid at its maturity. I think that the charge was in this respect correct.

[INGRAHAM, P. J., also wrote an opinion for affirmance.]

DALY, J., concurred in affirming the order, but wrote no opinion.

Order affirmed and a new trial denied.<sup>2</sup>

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<sup>2</sup> Approved in *Salt Springs N. B. v. Burton*, 58 N. Y. 430, 436.

# § 135 GERMAN-AMERICAN BANK OF ROCHESTER v. MILLI-MAN.

31 MISCELLANEOUS (MONROE COUNTY COURT, N. Y.) 87. — 1900.

SUTHERLAND, J. — This action was brought upon a promissory note dated January 6, 1899, made by the defendant, payable three months after the date thereof to the order of W. E. Williams, at the Central Bank, Rochester, N. Y., for \$39 and interest. Before maturity the note was indorsed by Williams, the payee, and transferred to the plaintiff. The day the note became due (April 6, 1899), shortly after 10 o'clock, a messenger from the plaintiff presented the note at the Central Bank, and requested payment, which was refused because the defendant's account was not good. The banking hours at the Central Bank are from 10 a. m. until 4 p. m.; the banking hours of the plaintiff are from 10 a. m. until 3 p. m. At about half past 3 of the afternoon of the same day the assistant cashier of the plaintiff, who is a notary public, presented the note at the

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If the bill or note is presented at a business office or a bank, it must be presented during customary business hours. *Parker v. Gordon*, 7 East (K. B.) 385. But if the holder finds a person at such office or bank after business hours upon whom demand may properly be made, such demand is good. *Garnett v. Woodcock*, 6 Maule & Selwyn (K. B.) 44; *Salt Springs Nat. Bk. v. Burton*, 58 N. Y. 430. See *post*, § 135. A notary's certificate need not name the time of day when presentment was made, for it will be presumed to be a reasonable hour. *Cayuga County Bk. v. Hunt*, 2 Hill (N. Y.) 635. But where the notary's certificate states that he presented the instrument at the office of the maker at 5:20 p. m., and found the door locked, it is error to refuse to hear evidence that this is not within the customary business hours. *Clough v. Holden*, 115 Mo. 336.

Where an instrument is payable at a bank it is sufficient that the instrument be in the bank on the day of maturity; the formal demand is made by the bank upon the maker's account, and if that be not sufficient to meet the note or bill, the instrument is dishonored. 1 Daniel on Neg. Inst., § 656. But it is held that the physical presence of the instrument in the bank, unknown to the officers (as where the letter in which it was sent was mislaid unopened), is not a presentment and demand. *Chicopee Bank v. Philadelphia Bank*, 8 Wall. (U. S.) 641.

§ 147. Whether, if a note is payable at a bank and is there presented, the bank is bound to pay it in case the maker has a sufficient deposit, has been a matter of much doubt. See Morse on Banks and Banking (3d ed.), §§ 556-564. It has been held that it is authorized, but not bound, to pay. *Bedford Bank v. Acoam*, 125 Ind. 584. Contra: *Grissom v. Commercial N. B.*, 87 Tenn. 350. It has been held that it is bound to pay out of the deposit if the bank itself holds the note. *German N. B. v. Foreman*, 138 Pa. St. 474. But not out of the deposit of an indorser, though he is known to be the principal debtor. *First N. B. v. Peltz*, 176 Pa. St. 513; though it may do so, *Mechanics', etc., Bank v. Seitz*, 150 Pa. St. 632. See *Aetna N. B. v. Fourth N. B.*, 46 N. Y. 82; *Indig v. National City Bank*, 80 N. Y. 106; *National Bank v. Smith*, 66 N. Y. 271. — H.



Central Bank, and demanded payment, which was refused because the defendant's account was not good. The notary immediately protested the note, and about 4 o'clock mailed notices of protest to the indorser and maker. After the notary had presented the note, and payment had been refused, Milliman deposited in the Central Bank cash, and a check which was treated as cash, sufficient in amount to make his account good for the note in suit. About 5 minutes before 4 o'clock Milliman deposited enough in the Central Bank to pay the note, and then went to the German-American Bank, and told its cashier that he had made his account good. The cashier told him that, as the note had already gone to protest, he would have to pay the face of the note and interest, and \$1.50 protest fees, which protest fees the defendant declined to pay. The correct amount of the protest fees was \$1.14.

This action was commenced April 15, 1899. The defendant's account remained good for the amount of the note from 5 minutes of 4 p. m. of April 6th until the morning of the day when the summons was returnable in this action, when defendant withdrew from the bank the amount of the note, with interest up to the date of its maturity, which amount he at once paid into court when he filed his answer pleading a tender. The municipal court gave judgment for the face of the note and interest to the date of the judgment, besides \$1.14 protest fees and the costs of the action.

The defendant insists that by making his account good for the note and accrued interest before the close of banking hours at the Central Bank he fulfilled his contract, and that the two demands and refusals which had been made earlier in the day did not put upon him the duty either of making a tender of the amount at the German-American Bank, or of paying the protest fees, and that the judgment appealed from is excessive in awarding plaintiff interest from the maturity of the note to the date of judgment, with protest fees, and that defendant not plaintiff, should have been awarded costs.

The respondent contends that it was not necessary for the notary to wait until the close of banking hours at the Central Bank, but that, the note having been once presented there for payment within banking hours, and payment being refused because of the want of funds, the note was thereby immediately dishonored, and was properly protested before 4 o'clock; and that, if the maker desired to fulfill his obligation after one presentment and refusal, he was bound to bring the money to the plaintiff's bank, and there tender the amount due, with the protest fees.

The question thus presented is not free from doubt, and there is no reported case in this state which is precisely analogous to the one at bar. Numerous expressions may be found, however, in the opinions of the courts pronounced during a long series of years, which, although *obiter dicta*, deserve respect, and serve to indicate with some

degree of certainty the views of the judges on the point involved here. In *Etheridge v. Ladd*, 44 Barb. 69, decided in 1865, the Supreme Court held that, where a note was made payable at the store of one Child, and a demand was made between 8 and 9 a. m., during the ordinary business hours at the store, the holder was at liberty at once to treat the note as dishonored, and immediately give notice of nonpayment to the indorser, without waiting until the close of business hours of that day. Judge Bockes, in the opinion, refers to the general rule that: "If payment be refused during the last day, the holder may give notice of its dishonor; yet, if payment be subsequently made on that day, such notice becomes of no avail. True, the maker has the whole of the last day of grace within which to pay; but, after due demand and refusal, followed by notice to the indorser, the maker, if he wishes to make payment, must seek the holder for that purpose." He recognizes, however, that more latitude is allowed the maker of a note payable at bank than is permitted the maker of a note payable at some other place, for at page 72 he says: "He [the holder] was not required to remain all day at the place to receive payment; nor was he bound by any custom—as, perhaps, he might have been had the note been payable at a bank—to leave the note until the close of the day. But his duty was at an end when he made presentation of the note for payment, at the proper place, at a reasonable hour, followed by immediate notice to the indorser." Again, at page 73, he says: "There is a custom at banks which gives to the maker all of bank hours within which to pay, and, in order to meet this custom, the note when payable at a bank, is usually left there, and demand is made at the close of the day." \* \* \*

[After discussing *Bank v. Elderkin*, 25 N. Y. 178, the court continues:]

Reference is made in the opinion to the case of *Gillett v. Averill*, 5 Denio, 85, in which latter case, in the opinion of Justice Whittlesey, written in 1847, it is said: "It is understood to be the custom of banks holding promissory notes payable at their own counter to wait, on the day of the maturity of the note, until the close of business hours, and then, if the maker has no funds, to give notice of nonpayment, without making any other demand of payment." This custom is sanctioned by the judicial decisions.<sup>3</sup> \* \* \*

In none of these cases was the precise point adjudicated which is involved in the case at bar, but the numerous *obiter dicta* of these learned jurists command attention so far as they recognize an exception to the general rule, founded on bank custom and common usage, giving the maker of a note payable at a bank until the close of banking hours to deposit money there to meet it, notwithstanding a presentation by the holder and refusal earlier in the day.

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<sup>3</sup> Referring to *Bank v. Crittenden*, 2 Thomp. & C. 118; *Hills v. Place* 48 N. Y. 520; *Osborn v. Rogers*, 112 N. Y. 573. — C.

Some of the text-book writers say this bank usage must be recognized and enforced by the courts. Mr. Tiedeman, in his work on Bills and Notes (published in 1898, which contains a discussion on the Negotiable Instruments Law passed in New York in 1897), at section 121, says: "The acceptor or maker has the whole day in which to make payment. But a second demand cannot be required of the holder. If the paper is payable in a bank, it would seem to be necessary to keep the bill or note at the bank, so that the acceptor or maker may make payment there at any time during the business hours of the day. If it is payable at the place of business or residence of the obligor, he must seek the holder, in order to make payment, where he fails to pay when the presentment is made."

Mr. Tiedeman refers, in a note to this section, to *Harrison v. Crowder*, 6 Smedes & M. 464. In that case it was affirmatively proven upon the trial that the bank where the note was payable had a custom by which makers had until the expiration of banking hours to pay, and that no note was considered dishonored if payment was made at the last moment. The court there says: "The law undoubtedly is that, by making a note payable at a particular bank, the parties are presumed to consent to be governed by such customs as may prevail in the bank, with regard to making demand of payment. A greater strictness must be observed in making these constructive demands than is necessary in personal demands. A personal demand may be made at any time during the third day of grace, but a constructive demand at bank having regular business hours must be made at the close of the business hours, for the maker has until that time to deposit the money for the payment of the note."

The same court, in a previous case (*Bank v. Markham*, 6 Miss. 397), said, where bank usage had been proven; "It follows, as a necessary consequence of this doctrine, that a note or other security thus payable at a bank cannot be considered as due until the expiration of the hour allowed for payment by the invariable usage of the bank, and that it must be left at the bank until the completion of the allotted period."

*Obiter dicta* may be found in reported cases upon the other side of the question. *McFarland v. Pico*, 8 Cal. 626 (opinion written by Judge Field); *Thorpe v. Pecks*, 28 Vt. 127. But in *McFarland v. Pico* the note was not payable at the bank, and in *Thorpe v. Pecks* no money was ever put in the bank to meet the note, and the note was protested about the time the bank closed; presenting facts quite similar to those in *Bank v. Elderkin*, 25 N. Y. 178, *supra*.

In the case at bar the teller of the Central Bank was called as a witness and gave this testimony: "Q. At what hour does the Central Bank protest promissory notes in the possession of the bank and payable at the Central Bank? A. At four o'clock."

But the claim is made in this case on behalf of the plaintiff that the Negotiable Instruments Law of 1897 has enacted that a demand

made at the bank where the note is payable at any time during banking hours on the day of maturity is sufficient, and that the note may be protested at once, if not immediately paid, and the protest fees charged to the maker of the note; and that the maker must seek the holder of the note after such presentment to make a legal tender of the amount due, even before the bank closes. But I do not think the statute discloses any intent to modify existing rules in this respect.

Section 130 provides that presentment for payment is not necessary in order to charge a person primarily liable; and, if the note is payable at a special place, the ability and willingness to pay it there at maturity are equivalent to a tender of payment. Section 131 provides: "Presentment of an instrument not payable on demand must be made on the day it falls due." Section 132: "At a reasonable hour on a business day." Section 133: "At the place of payment specified in the instrument." Then comes section 135, which is relied upon as establishing the rule contended for by plaintiff: "Where the instrument is payable at a bank, presentment for payment must be made during banking hours, unless the person to make payment has no funds there to meet it at any time during the day, in which case presentment at any hour before the bank is closed on that day is sufficient." In my opinion it was not the intention of the legislature, by section 135, to change the law as it stood up to that time, giving the maker of the note all of the banking hours to meet his note payable at the bank. The language of section 135 is taken almost word for word from the opinion of the Court of Appeals in *Bank v. Burton*, 58 N. Y. 430, in which case no funds were left in the bank to meet the note, and the note was not actually presented during banking hours, but an hour after, when the holder was admitted into the bank, where he found the cashier, of whom he demanded payment, who refused, on the ground that no funds had been left with which to pay. The indorser defended upon the ground that this presentation was insufficient to hold him, and that was the whole controversy. The court was not called upon to decide at what time during banking hours presentation should be made. And section 135, it seems to me, was incorporated into the Negotiable Instruments Law, not for the purpose of declaring that presentment at any time during banking hours is sufficient, but to codify the rule announced by the court in *Bank v. Burton*, that, even though no demand be made during banking hours, if no funds are left to meet the note, a demand will hold an indorser, if made upon a bank officer at the bank on the same day before the outer doors are closed. Section 132, requiring presentment in general to be "at a reasonable hour on a business day," is intended to prevent demands at unreasonable hours; for instance, 1 a. m. on the day of maturity. It does not declare what is a reasonable hour, and, unless the maker has until the close of banking hours to make his deposit, any time during banking hours must be considered reasonable. Fif-

teen minutes after the bank opens is as reasonable time for presentment and protest as fifteen minutes before the bank closes. This section works no change in the law.

Section 143 says: "The instrument is dishonored by non-payment when: (1) It is duly presented for payment and payment is refused or cannot be obtained." That section, however, is entirely consistent with the proposition that a note payable at a bank is not dishonored provided funds to meet it are deposited before the close of banking hours.

Section 144 says: "Subject to the provisions of this act, when the instrument is dishonored by nonpayment, an immediate right of recourse to all parties secondarily liable thereon accrues to the holder." This section is not inconsistent with the defendant's position, because the note is not dishonored absolutely if the deposit is made before the close of banking hours. If section 144 is to be construed as applying to notes payable at a bank, it might be argued with much force that the legislature intended to permit an indorser to be sued on the day the note falls due, and even before the close of banking hours, provided an early demand be made. I hardly think any such startling innovation was intended. *Smith v. Aylesworth*, 40 Barb. 104.

Section 173 says: "Notice [of protest] may be given as soon as the instrument is dishonored." In Crawford's Ann. Neg. Inst. Law, the editor says, in a note to this section: "The holder need not wait until the close of business hours, but may send notice at once;" and cites *Bank v. Swann*, 9 Pet. 33; *Lenox v. Roberts*, 2 Wheat. 373, and *Ex parte Moline*, 19 Ves. 216. But I do not think the learned author in this note intended to include promissory notes payable at a bank, for the cases cited by him are quite inapplicable to such paper.

In *Bank v. Swann*, 9 Pet. 33, 9 L. Ed. 40, the question was as to the form of notice of protest, and as to whether notice of protest should have been mailed on the evening of the day of the maturity of the note, or the following day. In fact, the note in that case was in the bank during the whole of the banking hours, and was not protested until after the bank closed. The court does not intimate that notice of protest can be sent out on such a note before the close of banking hours on the day of maturity. In *Lenox v. Roberts*, 2 Wheat. 373, 4 L. Ed. 264, the note was not payable at the bank, and there is nothing in the opinion or decision touching the point at issue here. In *Ex parte Moline*, 19 Ves. 216, the acceptor of a bill of exchange, when the bill was presented to him at 11 o'clock on the morning of the day it became due, refused payment, and declared that it never would be paid. The drawer had become bankrupt. The indorser immediately gave personal notice to the drawer. Assignees were thereafter, and on the same day, appointed for the bankrupt, and the

assignees objected to the allowance of the claim against the drawer on the ground that he had been discharged because the notice of dishonor was premature. Lord Chancellor Eldon said: "I do not recollect any decision that, if an acceptor declares at eleven o'clock in the morning that he will not pay, notice of that to the drawer is not good. If the law does not impose on the holder the duty of inquiring again before five o'clock, it would be extraordinary that this information to the drawer of an answer, precluding any hope of obtaining anything by calling again, should not have effect. If a banker says he will not accept, I cannot imagine that the holder is obliged to apply again at ten minutes before five."

Now, there is nothing in that decision or in the words of the lord chancellor militating against the contention of the defendant here. The bill of exchange in that case does not appear to have been made payable at a bank. Lord Eldon's reference to a banker is by way of illustration only; and probably he refers to a banker who refuses to honor a check when it is presented. Of course, the check can be protested, and an action commenced immediately against the drawer on behalf of the holder.

The language of Mr. Justice Story in *Mills v. Bank*, 11 Wheat, 431, would seem to indicate that in the opinion of that learned jurist the parties to a note made payable at a bank are bound by the usage of that bank as to the time given to the maker of the note to pay the same, without having the note go to protest.

My conclusion is that the maker of this note in suit was allowed, by commercial usage, until 4 o'clock to deposit at the Central Bank the money necessary to cover the note; and, such deposit having been made fifteen minutes before 4 o'clock, the maker is not in default. Although demand for the payment of the note was previously made, and the note protested for non-payment, the protest became of no avail on deposit of the amount of the note and interest, and the maker cannot be compelled to pay the protest fees thus incurred. I think this should be held to be the rule whether we regard the protest of the note earlier in the day as wholly bad or conditionally good — good on condition that the maker did not, before the close of banking hours, fulfill his engagement by making his account good at the bank where the note was payable. In *Daniel, Neg. Inst.* § 1036, it is said: "It would seem that in these cases of notice of dishonor given on the day on which the bill is payable the notice will be good or bad, as the acceptor may or may not afterwards pay the bill. If he does not afterwards pay it on that day, the notice is good; and, if he does, it, of course, comes to nothing."

I think the municipal court should have rendered judgment against the defendant for the amount of the note, with interest to the day of its maturity only; and that the judgment appealed from is excessive in so far as it adjudges defendant liable for interest after the maturity

of the note, or protest fees, or costs of the action. The judgment appealed from is, therefore, modified so that plaintiff shall recover of the defendant \$39.59 damages as of May 5, 1899, and no more; and by striking out the allowance for costs, \$9.90. The defendant (appellant) is allowed on this appeal \$10 costs, besides disbursements.

Judgment modified, with \$10 costs to appellant.

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## § 145 AN AMBIGUITY IN THE NEGOTIABLE INSTRUMENTS LAW.<sup>4</sup>

[23 HARVARD LAW REVIEW, 603-607.]

WHEN it is considered how carefully the Negotiable Instruments Law has been examined by critics,<sup>5</sup> and how long the practical working of the act has been tested, it may seem odd to discover now an ambiguity in a section of the statute which involves a question arising every week in the business of every large bank. But such a discovery emphasizes the difficulty under which the draftsman of a statute labors in attempting to foresee all questions that may arise and in expressing clearly the rule which he wishes to have enacted.

A section of the Negotiable Instruments Law which has recently been found to be either ambiguous or to mean something which bankers have not suspected until recently is section 85. This section is as follows:

"Section 85. Every negotiable instrument is payable at the time fixed therein without grace. When the day of maturity falls upon Sunday, or a holiday, the instrument is payable on the next succeeding business day. *Instruments falling due on Saturday are to be presented for payment on the next succeeding business day*, except that instruments payable on demand may, at the option of the holder, be presented for payment before twelve o'clock noon on Saturday when that entire day is not a holiday."<sup>6</sup>

The words in the section which have been italicised are those to which the following discussion relates; they are contained in the draft as recommended by the Commissioners of Uniform State Laws, and have been adopted in the law as enacted in most of the states.<sup>7</sup>

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<sup>4</sup> This article is by Professor Samuel Williston of the Harvard Law School. — C.

<sup>5</sup> See the articles by Professor Ames, 14 Harv. L. Rev. 241, 442, and the article by Mr. McKeehan, 41 Amer. Law Reg. N. S. 437, 439, 561. These articles together with defenses by Judge Brewster on the points criticized are reprinted in Professor Brannan's work on the Negotiable Instruments Law.

<sup>6</sup> This section is numbered as section 145 in the New York Statute, and in Mr. Crawford's book which reprints the statute as enacted in New York. It is enacted in the Massachusetts Revised Laws as section 102 of Chapter 73.

<sup>7</sup> In a few states changes have been made. Arizona, Kentucky, and Wisconsin omit the clause altogether. In Colorado the following words have

It has been the practice of banks, at least in the cities of New York and Boston, since the enactment of the Negotiable Instruments Law, to present on the following Monday all notes or bills whose date of maturity falls on Saturday. No presentment of such paper has been made, customarily, on Saturday. The propriety of this procedure was called in question in a case which arose not long ago in Boston. A large issue of interest-bearing notes of a railroad company was held by a trust company. By their terms these notes matured on Saturday and were payable at a specified bank in Boston. On the Saturday when the notes matured the railroad company had on deposit in the bank, where the notes were payable, sufficient funds for their payment. The notes were not presented until the following Monday, and when presented interest was demanded to the day of presentment. The bank, however, declined to pay interest for the interval between Saturday and Monday.

By the provisions of the Negotiable Instruments Law,<sup>8</sup> where an instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor, and further, by another section,<sup>9</sup>

"If the instrument is by its terms payable at a special place and the [the person primarily liable] is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part."

It was claimed by the bank at which the notes in question were payable that the notes were due on Saturday and that the presence of funds in the bank where the notes were payable operated as a tender of payment and therefore stopped the running of interest. The large amount of the notes involved made the question of interest for even two days one of consequence, but even more serious cases may be sup-

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been substituted: "Instruments falling due on any day, in any place where any part of such day is a holiday, are to be presented for payment on the next succeeding business day." In New York the year after the enactment of the Negotiable Instruments Law the words "or becoming payable" were inserted after the words "falling due." This change has been copied in Kansas. In Massachusetts this clause of the statute as originally passed was identical with the draft recommended by the Commissioners on Uniform State Laws, but the commissioners who prepared the Revised Laws of Massachusetts inserted the words "or payable" after the words "falling due," and the New Hampshire statute has followed the form of the Massachusetts Revised Laws. The insertion of the words "becoming payable," or "or payable," seems to have been made on the assumption that the words "falling due" meant something other than "becoming payable." This assumption seems unfounded.—See Mr. Crawford's note to section 145 of his book on the Negotiable Instruments Law.

<sup>8</sup> Section 87; Crawford's Neg. Inst. Law, sec. 147; Mass. Rev. Laws, c. 73, sec. 104.

<sup>9</sup> Section 70; Crawford's Neg. Inst. Law, sec. 130; Mass. Rev. Laws, c. 73, sec. 87.



posed involving the same question. A note maturing on Saturday may be held by a bank for collection for a correspondent. In accordance with the custom which has been prevalent the collecting bank would make no presentment until Monday. It may be supposed that on Saturday the note would have been paid had presentment been made, but that owing to supervening bankruptcy, or other cause, the note is dishonored when presented on Monday. If the note was legally due on Saturday the collecting bank has been guilty of negligence and is liable to its correspondent. The same question may be raised in determining when a right to interest accrues upon a note which matures on Saturday, and which does not bear interest according to its terms.

The case of the railroad notes alluded to above was submitted to the counsel both of the railroad and the trust company. The lawyers consulted agreed in the opinion that the trust company was not entitled to interest after the Saturday on which the notes matured. In support of this conclusion it was pointed out that by the terms of the Negotiable Instruments Law<sup>10</sup> presentment for payment is not necessary to charge the maker, and that the provisions in regard to presentment seem to relate to the steps necessary for charging indorsers and other persons secondarily liable. Furthermore, if it had been the intent of the statute to make a note maturing on Saturday for all purposes like a note maturing on Monday, the second sentence of section 85 would probably have been framed so as to read "when the day of maturity falls upon Saturday or Sunday, or a holiday, the instrument is payable on the next succeeding business day." The contrast between the words "*when the day of maturity falls upon Sunday or a holiday*" as used in the second sentence of the section with the words in the third sentence, "*Instruments falling due on Saturday*," is a strong indication that the words "falling due" mean something other than having the day of maturity fall upon Saturday. That is, the words do not mean as the words in the preceding sentence do, falling due according to the literal tenor of the instrument, but according to its legal effect. A slight additional argument also may be built upon the failure to mention Saturday in a subsequent section of the Act which provides that "Where the day, or the last day, for doing any act herein required or permitted to be done falls on a Sunday or on a holiday, the act may be done on the next succeeding secular or business day."<sup>1</sup>

On the other hand it was urged on behalf of the trust company that the uniform custom of banks, since the enactment of the Nego-

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<sup>10</sup> Section 70; Crawford's Neg. Inst. Law, sec. 130; Mass. Rev. Laws, c. 73, sec. 87.

<sup>1</sup> Section 194; Crawford's Neg. Inst. Law, sec. 5; Mass. Rev. Laws, c. 73, sec. 210.

negotiable Instruments Law, had been to treat instruments maturing on Saturday as if they were payable on Monday. The anomaly was also strongly urged of regarding a note as dishonored by the maker so far as his own liability was concerned on Saturday, when, so far as the liabilities of parties secondarily liable were concerned, the maker had not dishonored the note, and could not dishonor it until Monday. An action brought against the maker on Monday morning would then not be premature, though so far as the indorsers were concerned the maker had not yet dishonored the note. The law merchant prior to the Negotiable Instruments Law certainly contained no precedent warranting such a result. The practical inconvenience which would follow from the construction given by counsel to the statute was also noticed. If that construction is sound every instrument falling due on Saturday and bearing indorsements must be presented on Monday in order to charge the indorsers, but in order to start interest running, and in order to make sure that no chance of securing payment is lost, presentment must also be made on Saturday, if the instrument is by its terms payable at a particular place.

Though the question is not free from doubt, since clear language must be required to justify a result which is certainly an anomaly in the law of negotiable paper, yet on the whole the construction given by the eminent counsel consulted in the matter seems sound. The opinion of Mr. Crawford is in conformity with this view, although he does not seem to have perceived the anomalous result of not only authorizing but requiring presentment for payment in order to charge indorsers on a day other than that on which the instrument was legally due.<sup>2</sup>

The legal situation in regard to the matter caused such uneasiness to certain bankers in Boston that the question was presented by the Clearing House Committee to their counsel, who gave the following opinion:

"The language of the statute is not clear, and until it has been construed by the Supreme Court of this Commonwealth we think that the only safe course for a bank to pursue, which holds a note falling due on Saturday, is to present it for payment on Saturday, so as to protect itself from any claim for negligence by the holder, if the bank at which it is payable should have funds applicable to its payment on that day. If payment is refused on Saturday, the collecting bank should present it again for payment on Monday so as to charge the indorsers, who are entitled to a presentment on that day."

In consequence of this opinion the Clearing House Committee instructed their counsel to prepare an amendment to the law with a view to make it both free from ambiguity and in conformity with banking custom. Accordingly in the present session of the Massa-

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<sup>2</sup> Crawford's Neg. Inst. Law, 3d. ed., p. 110, sec. 145, note (a).

achusetts Legislature the section under discussion has been amended so that the portion relating to instruments falling due on Saturday reads as follows:

“When the day of maturity falls upon Saturday, Sunday, or a holiday, the instrument is payable on the next succeeding business day which is not a Saturday. Instruments payable on demand may at the option of the holder be presented for payment before 12 o'clock noon on Saturday when that entire day is not a holiday; provided, however, that no person receiving any check, draft, bill of exchange, or promissory note payable on demand shall be deemed guilty of any neglect or omission of duty or incur any liability for not presenting for payment or acceptance or collection such check, draft, bill of exchange or promissory note on a Saturday; provided, also, that the same shall be duly presented for payment or acceptance or collection on the next succeeding business day.”<sup>3</sup>

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### 3. AT THE PROPER PLACE.

#### § 133

#### BROOKS *v.* HIGBY.

11 HUN (N. Y. SUP. CT.) 235. — 1877.

ACTION by holder against indorsers. The bill was drawn on N. F. Mills, 114 South Main street, St. Louis, and by him accepted. The notary's certificate stated that the bill was presented “at the place of business of N. F. Mills, St. Louis.” It appeared in evidence that Mills had two places of business in St. Louis. Defendant moved for a nonsuit, which was denied. Judgment for plaintiff.

SMITH, J. — As the draft was addressed to the drawee at a particular place in the city where he resided, and was thus accepted by him, the particular place thus designated was the place of payment, and a due presentment and demand of payment at that place was necessary in order to charge the indorsers. (Story on Prom. Notes, § 227 and note 3, and cases there cited.) The certificate of the notary stated merely that the draft was presented and payment demanded “at the place of business” of the acceptor, without specifying the place. As it appeared that the acceptor had two places of business in St. Louis, the certificate furnished no evidence whatever that the presentment and demand were at the place where the draft was payable. The proof was fatally defective, and the motion for a nonsuit should have been granted.

The respondent's counsel proposed to supply the defect on the argument *at banc* by the production of a fresh certificate of the notary showing that the draft was presented at No. 114 South Main street.

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<sup>3</sup> Chapter 417.

The rule allowing evidence of a fact imperfectly proved at the trial to be exhibited at bar, in opposition to a motion for a new trial, is, in general, confined to records or documentary evidence which proves itself, and on which no question can arise in the cause, except such as is apparent on its face. (*Bank of Charleston v. Emerich*, 2 Sandf. 718; *Dresser v. Brooks*, 3 Barb. 429; *Burt v. Place*, 4 Wend. 591; *Armstrong v. Percy*, 5 Id. 555; *Ritchie v. Putnam*, 13 Id. 524; *Hugh v. Wilson*, 2 Johns. 46). Under the statute of 1833, a notarial certificate is but presumptive evidence, and may be explained or contradicted by the party against whom it is produced. The new certificate offered in this case cannot be received at bar to conclude the defendants; if it is to be used against them they are entitled to an opportunity to meet it at the trial.

We are also of opinion that the evidence required the submission of the question of usury to the jury.

Judgment and order should be reversed and new trial ordered, costs to abide event.

Present — MULLEN, P. J., TALCOTT and SMITH, JJ.

Judgment and order reversed and new trial ordered, costs to abide event.<sup>4</sup>

<sup>4</sup> A bill is drawn, accepted, and indorsed in Kentucky, where all the parties reside, but is addressed "To C., New York, N. Y." The holder knows these facts. The bill is in New York on the day of maturity. *Held*: Presentment was sufficient. If the instrument is payable in A., and the residence of the maker is in B., presentment should be in A. *Cox v. National Bank*, 100 U. S. 704. — H.

[In *Iron Clad Mfg. Co. v. Sackin*, 129 App. Div. (N. Y.) 555, a note was made payable at the "Jenkins Trust Company, Bath Beach Branch, Brooklyn." The trust company maintained principal offices in the business section of Brooklyn, N. Y., and plaintiff claimed that presentment at the principal offices of the company on the date of maturity was sufficient. HOOKER, J., said: "Section 133 of the Negotiable Instruments Law . . . provides: 'Presentment for payment is made at the proper place: (1) Where a place of payment is specified in the instrument and it is there presented.' It must be observed in reference to this statute that it mentions a 'place of payment,' and a place does not mean an individual, a corporation or institution. The Bath Beach Branch of the Jenkins Trust Company, as those words were used in the instrument, referred to the place of payment, and not the corporation, and the place was the spot where the Bath Beach branch of the trust company was accustomed to transact its business. . . . The place where the Bath Beach branch . . . did business was not the place where the principal offices of the trust company, at which the note was presented on the due date, were maintained. It, therefore, was not presented at the place designated for its payment, and there was no sufficient presentment to charge indorsers." — C.]

## § 133

GILPIN *v.* SAVAGE.

60 MISCELLANEOUS (N. Y. SUP. CT., ERIE CO. TRIAL T.) 605. — 1908.

WHEELER, J. — This action is brought against the indorser of a promissory note made by his son, Walter Savage, and by its terms made payable at the residence of the maker, No. 507 Prospect avenue, in the city of Buffalo, N. Y. The note is held by the indorsee of the original payee and was forwarded by him for collection to the Columbia National Bank of Buffalo.

On the day of the maturity of the note a clerk in the employ of the bank called up the maker on the telephone. The maker responded to the call at his house. The clerk then stated to the maker that the bank held the note for collection, described it, and asked the maker what he proposed doing with it. The maker replied, in substance, that he could not pay it; that he had an understanding or agreement that the note should be renewed, and if the bank would return the note it would be taken care of at the other end of the line. The clerk replied that they knew nothing about such an arrangement, and then called to the telephone the assistant cashier of the bank, who in turn talked with the maker. The maker repeated in substance what had been said to the clerk and was informed by the cashier that the bank would, under the circumstances, have to protest the note. No other presentation at No. 507 Prospect avenue was made, but the note was protested, and notice of the protest mailed to the indorser, this defendant.

The defendant contends that the necessary steps were not taken to charge him as indorser, and that the failure to present the note at its place of payment discharged him from liability.

The question is, therefore, fairly presented for determination whether the demand over the telephone was a sufficient presentation, and whether the bank was relieved of the obligation, under the facts, of actually going to the maker's house and making a further presentation and demand there. The researches of counsel and court are unable to discover any decided case directly in point. The case is novel in its features, and its decision of importance both to the parties and to the banking community.

As suggested, two lines of inquiry present themselves: First, was there a presentation at No. 507 Prospect avenue, and, if not, was its presentation excused so as to still charge the indorser? [After quoting sections 132, 133, 134, 142, and 144 of the New York Negotiable Instruments Law, the court continues:]

It was the evident purpose and intent of the framers of the statute to incorporate into the statute the provisions of the common law, although there follows the usual embarrassment which all codifiers encounter in framing a statute to meet all possible cases.

Was the note in this case presented at No. 507 Prospect avenue, the place of payment named in the note, within the reasonable meaning of the statute? We think it was. At the time of the conversation between the maker and the bank officials over the telephone, the maker was actually at the place of payment. The talk was immediately between him and the holder of the note. For every purpose of demand and refusal, it was just as effective as though the conversation had taken place between the parties when all were within the walls of the house itself. The maker knew perfectly well that a demand was then and there made upon him for the payment of the note in question, and he was then and there called upon to act. He did act, and treated it as a demand for payment, and declined to pay. He did not question the mode or manner of presentment, but declared his inability to meet the note, and made claim to some arrangement for its renewal. Of course, the maker had the right to have insisted on the exhibition of the note to him as evidence of the bank's authority to collect. That right was a right, however, personal to the maker, and, by not demanding its production, he waived it. If, on demand of payment, exhibition of commercial paper is not asked, and a party to whom demand is made declines to pay on other grounds, a mere formal presentation by actual exhibition of the paper will be considered waived. *Daniel Neg. Inst.* § 654; *Lockwood v. Crawford*, 18 Conn. 361; *King v. Crowell*, 61 Me. 244; *Porter v. Thom*, 40 App. Div. 34; affirmed, 167 N. Y. 584.

• It seems to the court that all the essentials of a good presentation were met. It was made on the day of the maturity of the note. The note was described to the maker, in a conversation with the maker at the place of payment, payment was asked and declined. So far as the maker was concerned all that he required was done. The indorser could not well demand more for his own actual protection. All that remains to the indorser is the purely technical ground of a failure to produce the note itself at the house, 507 Prospect avenue, which would have resulted in the same refusal of payment made over the telephone.

The use of the modern invention of the telephone is recognized by the courts. Commercial transactions and conversations had over the telephone have been recognized as of the same binding force as where the parties talked face to face. *Globe Printing Co. v. Stahl*, 23 Mo. App. 451, 458; *Wolfe v. Mo. Pacific R. R. Co.*, 97 Mo. 473; *Rock Island P. R. Co. v. Potter*, 36 Ill. App. 590; *Guest v. Hannibal & St. J. R. R. Co.*, 77 Mo. App. 258; *Thompson & W. Co. v. Appleby*, 5 Kans. App. 680; *Murphy v. Jack*, 142 N. Y. 215; *Dearing v. Shumpik*, 67 Minn. 348.

The telephone is simply an instrument by which two persons may talk directly to each other. Suppose the holder of a note should call to the maker from across a street as the maker stood in his doorway and notify him that he had his note and ask payment. Would not such

a demand be deemed in law a proper presentment, although the street separated the person holding the note and the actual place of payment? Can it make any substantial difference because the person holding the note happens to be some blocks away, provided he is able to reach the maker over the telephone and talk directly to him in that way? The law simply requires substantial compliance in reference to proper presentment, and will not strain to find grounds for releasing an indorser, where there has been such a substantial compliance, and any omission to observe the more technical rules does not work to the prejudice of the indorser.

Actual and formal presentation of notes has been held unnecessary to charge the indorser under many varying circumstances; as where the maker dies before the maturity of the note, and no representative of his estate has been appointed (*Daniel*, Com. Inst. § 1111), or where the maker has absconded (*Id.*, § 1125), or where the maker has removed from the state and taken up his domicile in another state or country. *Id.*, § 1145; *Foster v. Julien*, 24 N. Y. 28; *Eaton v. McMahon*, 42 Wisc. 487; *Whitney v. Allen*, 56 Iowa, 224; *McGruder v. Bank of Washington*, 9 Wheat. 598.

It has been held a sufficient demand and refusal to constitute a dishonor of a note if the maker, on the day it is due, calls on the holder where the note is, and declares his inability to pay, and desires the holder to give notice to the indorser. *Gilbert v. Dennis*, 3 Metc. (Mass.) 495.

So, too, in an action against an indorser, it appeared the holder met the maker of a note on the street and was refused payment, making no objection to the place of demand, and the court said: "If demand be made upon the maker elsewhere than the place appointed, and no objection be made at the time, it will be deemed a waiver of any future demand." *King v. Crowell*, 61 Me. 244. \* \* \*

The weight of authority, therefore, seems to be that the law is not over exacting as to the mode or method of presentation, so long as an opportunity is given the maker to pay the note or refuse its payment.

For these reasons we think the presentation made in this case, although over the telephone, met the substantial requirements of the law. \* \* \*

Judgment for plaintiff.

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## § 133

## BARNES v. VAUGHAN.

6 RHODE ISLAND, 259. — 1859.

ACTION by holder against indorser. At the trial before the court, to whom the case was submitted in fact and law, under the general issue, it appeared that the notes, which were not made payable at any particular place, had been left by the plaintiff at the Mount Vernon

Bank, in Foster, for collection; and that the only demand of payment made upon Northup, the maker, was by the usual printed bank notice, mailed to him by the cashier of the bank, and directed to him at Providence, where he lived, in the early part of the months in which they respectively fell due, although at what time precisely, the cashier of the bank could not recollect. Due notice of non-payment by the maker was proved to have been given to the defendant.

BOSWORTH, J. — The defense to this suit is, that no legal and proper demand was made on the maker of the note; and that therefore the indorser, who is here sued, is discharged. The rule of the common law is, that in order to charge the indorser, demand must be made on the maker for payment on the very day on which the note becomes due. In case the note on its face is made payable at a particular place, as at a bank named, it is necessary, and only necessary, to make demand at such place; but if no place of payment is named in the note at which the note is payable, it is necessary to present the note to the maker personally, or at his place of abode or business, before the indorser can be made chargeable. In this case, no place of payment was mentioned in the notes. The notes were left at the Mount Vernon Bank for collection; and it is agreed, that the maker had notice before the day of payment that they were there for that purpose. This notice could not avail to make the notes payable at said bank. The maker had not by the terms of his contract agreed to pay the notes at that bank, and a demand there was no demand upon him. It was necessary that demand should be made upon him personally, or at his dwelling, or place of business, on the last day of grace. No such demand was made, and the indorser, therefore, was never charged.<sup>5</sup>

Judgment must, therefore, be rendered for the defendant, for his costs.<sup>6</sup>

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## § 133 BANK OF ORLEANS v. WHITEMORE.

12 GRAY (MASS.) 469. — 1859.

ACTION by holder against indorser. Note made and dated in Boston, but maker's residence and place of business then and ever since in North Carolina. This was known to holder's agent at maturity. No demand on maker in North Carolina.

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<sup>5</sup> Accord: *Bayless v. Harris*, 124 Mo. App. 234. — C.

<sup>6</sup> The anomalous custom prevails in Massachusetts and Maine of making such a demand sufficient. *Mechanics' Bank v. Merchants' Bank*, 6 Met. 24; *Warren Bank v. Parker*, 8 Gray, 221; *Gallagher v. Roberts*, 11 Me. 489; *Maine Bank v. Smith*, 18 Me. 99. So in New England there seems to be a local custom of drawing notes "payable at any bank" in a given city, and in such case it is sufficient that the instrument is at any bank in the place named on the day of maturity. *Malden Bank v. Baldwin*, 13 Gray, 154; *Langley v. Palmer*, 30 Me. 467; *Jackson v. Parker*, 13 Conn. 342. — H. [On this point see note in 13 L. N. S. at p. 305. — C.]



METCALF, J. [After stating the facts.] — On these facts the question is, whether the defendants are liable as indorsers. If they are, it is not because seasonable demand was made on the promisor and seasonable notice of non-payment given to them. The note fell due on Saturday, May 3d — the last day of grace being Sunday — and no demand was made on the promisor until nine days afterwards. This delay discharged the defendants from their liability to the plaintiffs unless the fact that the promisor always resided in North Carolina excused the holders from making personal demand on him, or from using due efforts to make such demand. The plaintiffs rely on this fact to sustain their action, and cite the decision in *Smith v. Philbrick* (10 Gray, 252), as conclusive in their favor. That was an action by an indorser against a prior indorser of a note made in Boston by one whose only residence and place of business were in Texas, and on whom no demand was made; and it was decided that no demand on him was necessary to charge the defendant. The court said there was no evidence to show whether the plaintiff, or any of the subsequent holders of the note, knew where the promisor's residence was; that if his residence had been known to the holder, at the maturity of the note, it might perhaps have been incumbent on him to forward it to Texas for presentment, as was held in *Taylor v. Snyder* (3 Denio, 145).

In the case before us, the plaintiff's agent, whom they employed to purchase and also to collect the note, knew where Moore's residence was, and the legal effect of his knowledge of that fact is the same as would have been the effect of their knowledge of it. Notice to an agent, whilst he is concerned for the principal, is notice to the principal himself. And we are of opinion, as intimated in *Smith v. Philbrick*, that by reason of the plaintiff's knowledge (through their agent) of the place of Moore's residence, a demand on him there, and seasonable notice of his default, were prerequisites to the defendants' liability as indorsers. We think this case is within the general and familiar rule which applies to the holders of indorsed notes, and not an exception to that rule.

When a resident in the state, after giving a note, removes from the state and takes up a residence out of the state, it has been repeatedly decided that it is not necessary, in order to charge an indorser of the note, to demand payment of the promisor at his new residence.<sup>7</sup> This exception to the general rule which requires demand on the promisor, and notice to the indorser, seems to be established. But we see no sufficient reason for taking the present case out of that rule. And we hold, that where the maker of a note, when it is made and indorsed, has a known residence out of the state, which residence remains unchanged at the maturity of the note, demand must be made on him,

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<sup>7</sup> *M'Gruder v. Bank*, 9 Wheat. (U. S.) 598. — H.

or due diligence used for that purpose, and notice of non-payment given to the indorser before the indorser can be charged. So it was decided by the Court of Appeals in New York, in *Taylor v. Snyder*, before referred to, and in *Spies v. Gilmore* (1 Comst. 321). In this last case, Bronson, J., said:—

“The only excuse which has been offered for not making demand is, that it would have been inconvenient to go or send to Matamoras for the purpose. It is often inconvenient to present the note for payment, when the maker and holder both reside in the same state; and yet, when the maker has a known place of residence, and there has been no change of circumstances after the giving of the note, mere trouble or inconvenience to the holder has never been held a good excuse for omitting demand. And this is so, however wide asunder the maker and holder may live. If the plaintiff wished to avoid the inconvenience of sending to Matamoras, he should have made the note payable in New York, or got an indorsement with a waiver of demand. He has no right to change the contract which the indorser made, for the purpose of promoting his own convenience.”

Judgment for the defendants.<sup>8</sup>

## § 133

## PARKER v. KELLOGG.

158 MASSACHUSETTS, 90. — 1893.

ACTION by holder against indorser. Defense, want of demand on maker. The notes specified no place of payment. Presentment was made to the maker personally at the office of the indorser.

FIELD, C. J. \* \* \* Whether the defendant's office was Hart's place of business or not, if the plaintiff made a demand upon Hart personally at this office during business hours of the last day of grace, and produced the notes, and Hart said that he was unable to pay them, and made no objection to the place of the demand, this would be a sufficient demand, and to this effect were the instructions given by the court. (*King v. Crowell*, 61 Maine, 244; 1 Danl. Neg. Insts., § 638, [4th Ed.]).

Exceptions overruled.<sup>9</sup>

<sup>8</sup> *Taylor v. Snyder*, 3 Denio (N. Y.) 145 — 1846. Note dated Troy, N. Y. Maker then and afterwards resided in Florida, to the knowledge of the first holder and of the subsequent indorsee (plaintiff). Presentment (not personal or at maker's office or residence) is made in Troy. Held, Presentment not sufficient. “Where no change has taken place in the residence of the maker, between the making of the note and the time of its payment, the intervention of a state line does not dispense with the necessity of making due demand of payment.” — H.

<sup>9</sup> See *Sussex Bank v. Baldwin*, 17 N. J. L. 487, ante, p. 480. — H.

## 4. TO THE PROPER PERSON.

## § 132

## STINSON v. LEE.

68 MISSISSIPPI, 113, — 1890.

ACTION by holder against indorser. Demurrer to declaration sustained. Plaintiffs appeal.

COOPER, J., delivered the opinion of the court.

The demurrers to the original and amended declarations were properly sustained. Lee was the payee in a promissory note, subscribed by the maker thereof, "A. G. Cunningham, Ag't," nothing appearing on the face of the note indicating for whom he professed to act as agent. After the maturity of the note he indorsed the same to the plaintiffs, who some time thereafter presented the note to S. A. Cunningham, wife of A. G. Cunningham, and who, the declaration avers, was his principal, "and demanded payment thereof, and sued out an attachment for rent against her, in order to collect said note, of all of which said Lee had immediate notice."

The present suit is against S. A. Cunningham as maker and against Lee as indorser of the note.

The liability of Lee rested wholly upon his indorsement, and that liability was to pay the note, if seasonable presentment to the maker should be made and payment refused, and Lee notified thereof.

A. G. Cunningham, and not S. A. Cunningham, was the maker of the note, the word "agent" following his signature being — in the absence of the name of the principal — merely *descriptio personæ*. (1 Danl. on Neg. Inst. §§ 303–305.) We are not called upon to decide whether, in a proper action, Mrs. S. A. Cunningham might be made liable on the consideration for which the note was given; nor whether, as between the original parties, A. G. Cunningham was liable on the note. The sole question is whether Lee, who indorsed the note signed by "A. G. Cunningham, Ag't," can be held on his indorsement by virtue of a presentment to one whose name nowhere appears on the note, and we think that he cannot, because such person was not the maker of the note, for whose default only was he bound by his indorsement.

Judgment affirmed.

## § 136

## TOBY v. MAURIAN.

7 LOUISIANA, 493. — 1834.

ACTION against indorser. Defense, want of due presentment. Judgment for plaintiff on the authority of *Hale v. Burr* (12 Mass. 86.)

MARTIN, J., delivered the opinion of the court.

The defendant is sued as indorser of a promissory note, for one thousand dollars, executed by Peychaud. Judgment was rendered against him for the amount claimed. He now claims a reversal of the judgment, on the ground that he was condemned as indorser to pay the sum demanded, when payment was never demanded from the maker, nor from any person representing him, or succeeding to his rights and obligations.

The record shows that the maker died on the last day of grace, or during the night preceding it. That when the notary's clerk called at the house and late domicile of the drawer of the note sued on to demand payment, he found no person present except a mulatto woman, who informed him of the death of Peychaud, and pointed him to the corpse in the coffin. The note was then protested, without any inquiry or demand being made of any heir or representative of the deceased.

It is clear that no recourse can be had against the indorser of a note until a demand has been made on the maker, if living, or on his heir or legal representative after his death, unless the impossibility of making such a demand is made apparent. This has not been shown in the present case. The authorities on this point, and which support the position here laid down, are numerous, of the highest character and authority, and conclusive on this subject. (*Chitty on Bills*, 317 ed. 1828; *Bayley*, do. 128; 2 *Practical Abr. of Am. Cases*, 288, 292; 3 *Peters*, 89; 7 *Id.* 287; 7 *Martin*, 364; 1 *Pardessus*, 392; *Pothier, Contrat de Chance*, No. 146.)<sup>1</sup>

It is therefore ordered, adjudged, and decreed, that the judgment of the District Court be annulled, avoided and reversed; and that judgment be entered for the defendant, with costs in both courts.<sup>2</sup>

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**§ 137****CAYUGA COUNTY BANK v. HUNT.**

[*Reported herein at p. 694.*]

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**§ 138****BLAKE v. McMILLAN.**

33 IOWA, 150. — 1871.

ACTION against indorser of a note made by W. G. Harding and Daniel Van Patter. Presentment and demand on Harding alone. Judgment for plaintiff.

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<sup>1</sup> See *Reed v. Spear*, 107 App. Div. (N. Y.) 144. — C.

<sup>2</sup> Although the indorser be the administrator or executor of the deceased maker, demand must be made upon him as executor and notice given to him as indorser. *Magruder v. Union Bank*, 8 Curtis 299, 3 Peters, 87; *Groth v. Gyger*, 31 Pa. 271. — H.

MILLER, J.—On a former appeal in this case, it was held that a presentment to one only of the two joint makers was not sufficient to charge the indorser, unless some legal excuse be shown for the failure to make presentment to the other. (*Blake v. McMillen*, 22 Iowa 358.) The agreed facts show that David Van Patter died before the maturity of the note; that Eliza Van Patter was his legal representative when the note became due and no excuse is shown for a failure to make presentment to her. Following the ruling on the former appeal the judgment is

Reversed.<sup>3</sup>

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#### 5. BY EXHIBITING THE INSTRUMENT.<sup>4</sup>

§ 134

WARING *v.* BETTS.

[*Reported herein at p. 524.*]<sup>5</sup>

§ 134

GILPIN *v.* SAVAGE.

[*Reported herein at p. 510.*]

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### III. When delay in presentment excused.

§ 141

PIER *v.* HEINRICHSHOFFEN.

67 MISSOURI, 163. — 1877.

HOUGH, J.—This was an action brought by the plaintiffs, as holders of a negotiable promissory note, against the defendants, as indorsers thereof. The questions presented for determination are, whether the plaintiffs used due diligence in making demand of pay-

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<sup>3</sup> Accord: *Arnold v. Dresser*, 8 Allen (Mass.) 435; *Shutts v. Fingar*, 100 N. Y. 539; *Benedict v. Schmieg*, 13 Wash. 476. — H.

<sup>4</sup> See *Citizens' Bank v. First Nat. Bank*, 135 Iowa, 605, reported in 13 L. N. S. 303, with note entitled "Necessity of actual presentation of commercial paper to effect its dishonor." — C.

<sup>5</sup> "No valid presentment and demand can be made by any person without having the note in his possession at the time, so that the maker may receive it in case he pays the amount due, unless special circumstances, such as the loss of the note or its destruction, are shown to excuse its absence." *Arnold v. Dresser*, 8 Allen (Mass.) 435; *Musson v. Lake*, 4 How. (U. S.) 262. But if the one making demand has the instrument but does not exhibit it, the presentment is good where the maker does not ask to see the instrument, but refuses payment on other grounds. *Legg v. Vinal*, 165 Mass. 555. — H. [See also *Bank of Vergennes v. Cameron*, 7 Barb. (N. Y.) 143, and *Farmers' Bank v. Durall*, 7 Gill & J. (Md.) 78. — C.]

ment, and gave the requisite notice of non-payment to the defendants. The facts are as follows: The note in question matured on the 4th day of July, 1861, and was payable at the banking house of F. and G. Willins, in the city of St. Paul, Minnesota. Some time in April, 1861, the plaintiffs delivered the same to the bank of Cooperstown, at Cooperstown, New York, for collection. At that time a letter, in due course of mail, would reach St. Paul from Cooperstown in about six days. The cashier of the bank of Cooperstown sent the note by mail to its regular correspondent, the Bank of St. Paul, in the city of St. Paul, for collection, in ample time, as the cashier stated, for it to reach its destination by ordinary course of mail, before the maturity of the note. When the letter reached St. Paul, the Bank of St. Paul had made an assignment, and the envelope having printed on it the words "From the Bank of Cooperstown," the postmaster at once returned it to the Bank of Cooperstown, with the indorsement "bank failed." The letter was received by the Cooperstown Bank in the original envelope, unopened, on the 9th day of July, 1861, and on the same day the note was returned by mail to St. Paul in a letter directed to F. & G. Willins, who caused it to be presented and protested on the 15th day of July, 1861, the day on which it was received.

The defendants contend that there was a want of diligence in not sending the note in time to guard against such contingencies as the evidence discloses, and that the action of the postmaster in the premises is no sufficient excuse for the failure to present for payment on the day of the maturity of the note. Professor Parsons, in his treatise on Notes and Bills, says: "Ordinarily any failure to present a note at the proper time, by reason of the negligence of an agent, would discharge an indorser, but where the holder makes use of the public mail for the purpose of transmitting the note to the proper place in season to have a legal demand made, and without any negligence on his part, we should say that he would not lose his remedy on an indorser, if through any accident or disorder, or the negligence or mistake of the postoffice clerks, the note does not reach the destined place in season to make demand on the very day of maturity." (Vol. 1, p. 461.) In support of his text he cites the case of *Windham Bank v. Norton* (22 Conn. 213). \* \* \*

We have been referred by defendants' counsel to the case of *Schofield v. Bayard* (3 Wend. 488), as being in direct conflict with the case just cited from Connecticut; but a careful examination of the facts in *Schofield v. Bayard* will show that there is no conflict whatever between the two cases. \* \* \* It will be seen that the court places its judgment expressly upon the ground that the holder was guilty of negligence in sending the bill to Liverpool, and this fault of his produced the impossibility by virtue of which he claimed to be discharged. In the present case the letter containing the note was not

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misdirected; it was properly directed; it actually reached St. Paul in time, and but for its unauthorized return by the postmaster, the probabilities are that some agent or representative of the suspended bank would have received it in time to make due presentment, as the testimony tends to show that the representatives of the bank continued to receive letters addressed to it, after its suspension. The holders therefore exercised due diligence in sending the note when they did; its arrival in time demonstrates that fact; and they were not required to make provision in advance for a possible, but unanticipated suspension of the Bank of St. Paul before arrival of their letter, or for an unwarrantable interference with the same by the public officer in charge of the mails, after its arrival. We are of the opinion, therefore, that under the circumstances of this case, the demand was seasonably made.

[The court then decides that a notarial certificate stating that the notices were "put into the postoffice at St. Paul directed as follows," is sufficient without a statement that the postage was prepaid.]<sup>6</sup>

Reversed.<sup>7</sup>

#### IV. When presentment dispensed with.

##### 1. WHEN NO RIGHT TO REQUIRE OR EXPECT IT.

### § 139

#### BEAUREGARD *v.* KNOWLTON.

156 MASSACHUSETTS, 395. — 1892.

JUDGMENT for plaintiff. Defendant excepts.

BARKER, J. The action is upon checks which have never been presented to the bank upon which they were drawn. The only question argued is as to the correctness of the ruling that, if the facts were as testified to by the president of the bank, the plaintiff was excused from presenting them. The checks were dated on December 16, 1889, — one for the sum of \$250, bearing a pencil memorandum, "Draw Dec. 19th;" one for \$125, bearing a similar memorandum, "Draw Dec. 26th;" and one for \$125, with a memorandum, "Draw Dec. 28th." They were signed by the defendant with the name of J. G. Knowlton & Co., which was the style under which he did business. The president of the bank testified that on December 16, 1889, and during the remainder of that month and the following January, J. G. Knowlton & Co. had no funds in the bank, but that one M. E. Knowlton had an account at the bank, and the bank had written authority from him to pay checks signed by J. G. Knowlton & Co.,

<sup>6</sup> See Neg. Inst. L., § 176. — H.

<sup>7</sup> See also *Schofield v. Bayard*, 3 Wend. (N. Y.) 488, *post*, p. 704; 1 Daniel, § 478. — H.

charging the same to the account of M. E. Knowlton, and that acting upon this authority the bank had been in the habit of so doing, and that on December 16, 1889, the deposit of M. E. Knowlton was \$51.15; on December 19th, \$117.28; on December 26th, \$61.13; and on December 28th, \$8.18.

We assume that under ordinary circumstances the drawer of a check is not liable to a suit upon it without presentment to the bank, and dishonor. *Kelley v. Brown*, 5 Gray, 108; *Tassell v. Lewis*, 1 Ld. Raym. 743; *Cruger v. Armstrong*, 3 Johns. Cas. 5; *Conroy v. Warren*, 3 Johns. Cas. 259; *Murray v. Judah*, 6 Cow. 484, 490; *Little v. Bank*, 2 Hill, (N. Y.) 425; *Case v. Morris*, 31 Pa. St. 100, 104; *Purcell v. Allemon*, 22 Grat. 739; *Woodruff v. Plant*, 41 Conn. 314, 347; *Foster v. Paulk*, 41 Me. 425. But the cases cited, and many others, hold that a check is in the nature of a bill of exchange, payable on demand, and that many of the same rules apply to both. *Barnet v. Smith*, 30 N. H. 256, 264; *Bickerdike v. Bollman*, 1 Term R. 405; *Boehm v. Sterling*, 7 Term R. 423, 426. The drawer of a bill of exchange is liable without presentment, if he has no effects in the hands of the drawee, unless the drawee has something equivalent to effects, or has agreed to accept and pay, or the drawer has some ground for a reasonable expectation that the bill will be accepted and paid. *Kinsley v. Robinson*, 21 Pick. 327, 328, and cases cited; *Bank v. Hughes*, 17 Wend. 94, 97. The same general principles are applied to checks, and presentment is excused where the making of the check was a fraud upon the part of the drawer; he having no funds in the bank, and no ground for a reasonable expectation that it would be paid. Byles, Bills, (11th Ed.) 216; Chit. Bills, (Amer. Ed. 1836,) 423; *Franklin v. Vanderpool*, 1 Hall, 78; *Harker v. Anderson*, 21 Wend. 372, 375; *Case v. Morris*, 31 Pa. St. 100, 104; *Sterrett v. Rosencranz*, 3 Phila. 54; *Hoyt v. Seeley*, 18 Conn. 352, 360; *True v. Thomas*, 16 Me. 36; *Foster v. Paulk*, 41 Me. 425, 428; *Terey v. Parker*, 6 Adol. & E. 502; *Wirth v. Austin*, L. R. 10 C. P. 689. In this case the drawer had no funds in the bank, and no authority from the bank to draw upon it. One M. E. Knowlton had a deposit account with the bank, and had given it authority to pay and charge to his account checks signed by J. G. Knowlton & Co., and the bank had been in the habit of so doing. But the deposit of M. E. Knowlton was never sufficient to pay any one of the checks in suit, and the bank had no authority to allow the account of M. E. Knowlton to be overdrawn by such checks, and there was no evidence that it had ever pursued such a course. So that the defendant could have had no ground for a reasonable expectation that the checks would be honored by the bank. When the defendant made them, he knew they would not be paid if presented, as well as though there had been no arrangement as to his checks between the bank and M. E. Knowlton. Notice of non-payment would have given him no new knowledge. The presentment of either of the checks would not



have entitled the plaintiff to demand from the bank the actual balance to the credit of M. E. Knowlton. *Dana v. Bank*, 13 Allen, 415. So that the facts testified to show affirmatively that no loss happened to the defendant by the omission of presentment.

Exceptions overruled.<sup>8</sup>

## § 139

## CATHELL v. GOODWIN.

[Reported herein at p. 576.]<sup>9</sup>

<sup>8</sup> "It is next argued that the court should have directed a verdict for the plaintiff, and that in refusing to do so there was reversible error. This contention is grounded, first, upon the proposition that no presentment of the check or draft to Gilman, Son & Co. for payment has been shown; and, if such presentment is an indispensable condition of the drawer's liability to the payee, the point is well taken, for such proof is evidently lacking. By section 3060a79 [N. Y., § 139] of the Code Supplement of 1902 it is provided that presentment for payment is not required to charge the drawer, where he has no right to expect or require the drawee to pay the instrument. The appellee invokes the benefit of this provision. It is alleged, as we have seen, that appellant knew Gilman, Son & Co. to be in a failing condition when it sold the draft to appellee. In support of this claim there was evidence of admissions by the cashier to the effect that he had for some time been doubtful of the financial soundness of said firm; that the bank had suspected the stability of said firm, but had continued to use it as correspondent because of the habit or custom arising from a long business acquaintance; and that the bank guarded itself against great risk by keeping a small balance only in the hands of its correspondent. These admissions, some of which were shown to have been made prior to the date of this transaction, were testified to without objection by three or more different witnesses. It was shown, also, that, taking into account drafts in transit, the appellant's balance with its correspondent was frequently overdrawn, or reduced to a comparatively trifling sum, and that on October 13, 1902, the day on which appellant claims the demand for payment should have been made, its actual balance with said correspondent was insufficient to pay the draft in controversy. While this showing was not a strong one, yet we think it sufficient to carry the case to the jury upon the question whether, in view of all the facts, the managing officers of the bank in the issuance of said draft had any right as reasonable men to rely upon or expect Gilman, Son & Co. to honor said draft by payment, if presented within a reasonable time for that purpose." *WEAVER, C. J., in West Branch State Bank v. Haines*, 135 Iowa, 313. — C.

<sup>9</sup> See also § 185, 186; *Cashman v. Harrison*, 90 Calif. 297.

Mere want of funds in drawee's hands not enough to excuse presentment. *Knickerbocker Life Ins. Co. v. Pendleton*, 112 U. S. 696, 708; *Welch v. Mfg. Co.*, 82 Ill. 579.

If drawer or indorser has received funds or assets from the acceptor or maker under an agreement to pay the bill or note, he has no right to expect or require demand and notice. *Wright v. Andrews*, 70 Me. 86. Query, When he has received security but with no agreement to pay. 2 Daniel on Neg. Inst., §§ 1129-1143; 4 Am. & Eng. Enc. Law (2d ed.), 447-448. — H.

## 2. ACCOMMODATION INDORSERS.

## § 140 MORRIS v. BIRMINGHAM NATIONAL BANK.

93 ALABAMA, 511. — 1890.

ACTION on a promissory note. Judgment for plaintiff and defendant appeals.

CLOPTON, J. — The note sued upon was made by John W. Read, payable to B. C. Scott, defendant's intestate, at the Birmingham National Bank, and by him indorsed to the bank. It being admitted that payment of the note was not demanded of the maker, and that due and legal notice of its dishonor was not given, so as to charge the indorser, it devolved on plaintiff to show a sufficient excuse for failure to give the notice. For this purpose the depositions of Read, the maker, were introduced to prove that the note was made for the accommodation of Scott, the indorser. \* \* \*

The material question is, whether the indorser of a note, made for his accommodation, is discharged from liability on his indorsement by the failure of the holder to demand payment of the maker, and to give the indorser notice of the non-payment of the note. To this question a negative answer must be given, on principle and authority. To the general rule, requiring such notice, there are well recognized exceptions. In its application to bills of exchange, the failure to give notice will be excused as to the drawer, where he has no funds in the hands of the drawee, and no reasonable ground to expect that his bill will be honored. The reason on which this exception rests, exists where a note is made for the accommodation of the indorser, for the purpose of raising money for his benefit, by discount or otherwise, he being the real debtor, and primarily bound for its ultimate payment. In such case, notice can amount to nothing, there being no party against whom he can have recourse upon paying the note, and no possibility that he can be injured by the failure to give notice. He, like the drawer of a bill in such case, is without funds, and has no right to expect the maker to pay the note. *French v. Bank of Columbia*, 4 Cr. 141; *Keys v. Winter*, 51 Me. 399; 2 Dan. on Neg. Inst., § 1085; Tied. on Com. Paper, § 355. It being shown by the testimony of Read, without contradiction, that the note sued on was made for the accommodation of Scott, notice of its dishonor was not requisite to charge the indorser. \* \* \*

Judgment affirmed.<sup>1</sup>

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<sup>1</sup> See also *McVeigh v. Bank of Old Dominion*, 26 Gratt. (Va.) 785; *Turner v. Sampson*, 2 Q. B. Div. 23; *Witherow v. Slayback*, 158 N. Y. 649; *Am. Nat. Bank v. Junk Bros.*, 94 Tenn. 624, *post*, p. 579. — C.

## 3. WHEN IMPOSSIBLE.

## § 142

MOORE *v.* COFFIELD.

1 DEVEREUX LAW (N. CAR.) 247. — 1827.

ACTION against indorser. Judgment for defendant.

HALL, J. \* \* \* It was proved that Best, the maker of the obligation, was a seafaring man, and at or about the time the obligation became payable, sailed from Washington, as master of a vessel bound to New York; and it did not appear that he had a domicile, or any establishment within the state, at which payment could be demanded. The maker being at sea, in his usual employment, and the indorsee not being bound to follow him beyond the state, it follows, that if he had no such domicile or establishment, a demand should be dispensed with.

In this view of the case, the defendant was liable upon his indorsement, without any express promise to pay, and the jury should have been so instructed — and consequently, for the judge's omission to give such instruction, there must be a new trial.

PER CURIAM. — Judgment reversed and a new trial awarded.<sup>2</sup>

## § 142

WARING *v.* BETTS.

90 VIRGINIA, 46. — 1893.

ACTION against indorsers of a note payable at the Business Men's Bank, Richmond. At maturity the bank was defunct. Demand (without presentment) was first made on W., a former officer of that bank (and also one of the indorsers), who replied that the funds had been distributed and there were no assets. Later in the day, at 5:30 P. M., the notary with the note in his possession went again to the office of W., but it was closed; he then went to the residence of W., but he was not there. He then protested the note and gave due notice to the indorsers. The maker lived at Danville, Va., at which place the note was dated.

LACY, J. (after stating the case), delivered the opinion of the court.

The first question arising here is that raised by the demurrer. The declaration states a good case, and sets forth that on its due day it was duly presented for payment of the sum of money therein specified, required, payment refused, and that it was duly protested, etc.

<sup>2</sup> But if the maker have a residence, presentment must be made there. *Dennie v. Walker*, 7 N. H. 199.

Demand is not excused because the maker is an infant. *Wyman v. Adams*, 12 Cush. (Mass.) 210. — H.

And the defendants' demurrer to the plaintiff's declaration was properly overruled.

The claim of the defendants is that there was no presentment of the note, because when payment was demanded of the indorser, W. L. Waring, Jr., manager of the late Business Men's Bank, Mr. Glenn did not have the note in his possession, and could not have presented it, but as has been seen from the facts found by the jury, payment was refused by Waring, and the note not asked for, but payment refused, and the statement made that he was not authorized to represent the bank, which had ceased to do business and had distributed its assets.

Presentment of the bill or note and demand of payment should be made by an actual exhibition of the instrument itself;<sup>3</sup> or at least the demand of payment should be accompanied by some clear indication that the instrument is at hand ready to be delivered, and such must really be the case. This is requisite in order that the drawer or acceptor may be able to judge (1). of the genuineness of the instrument; (2) of the right of the holder to receive payment; and (3) that he may immediately reclaim possession of, upon paying the amount. If, on demand of payment the exhibition of the instrument is not asked for, and the party of whom demand is made decline on other grounds, a formal presentment by actual exhibition of the paper is considered as waived. (Daniel on Neg. Inst., p. 485, § 654, citing *Lockwood v. Crawford*, 18 Conn. 361, and *Fall River Union Bank v. Willard*, 5 Metcalf, 216.)

All the parties subsequent to the principal payer are bound only as his guarantors, and promise to pay only on condition that a proper demand of payment be made, and due notice be given to them in case the note or bill is dishonored. And we repeat this as one of the fundamental principles of the law of negotiable paper; and the infrequency and the character of the circumstances which will excuse the holder from making this demand, and still preserve to him all his rights as effectually as if it were made, will illustrate the stringency of the rule itself. (Parsons on Notes and Bills, vol. 1, 412.) The question of excuse, then, will depend upon whether due diligence has been used, and presents the ordinary inquiry as to negligence. The principal excuses resolve themselves into two classes —

First. The impossibility of demand.

Second. The acts, words, or position of a party, proving that he had not right, or waived all right to the demand of the waiver of which he would avail himself.

That impossibility should excuse non-demand is obvious, for the law compels no one to do what he cannot perform. But it must be actual and not merely hypothetical; and though it need not be absolute, no slight difficulty will have this effect. (*Id.*)

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<sup>3</sup> See § 134. — H.

The circumstances which will excuse a demand are such generally as apply to a failure to present and demand payment within the required time, not absolutely. (Parsons, 444, 445.)

In this case the presentment of the note was not made at bank within the usual bank hours, with the note in possession, but as we have seen, this was excused in this case (1) by the fact that there was no bank to present it at, and (2) because payment was refused upon the ground that the bank had ceased to do business, and its assets distributed, and the note was not asked for, nor required, payment being refused on other grounds; the right to have it produced must be considered as waived.

The note, however, was carried, during the day, to the place of business of the late manager of the bank, and the indorser sought to be charged, and this being closed, it was carried to his residence, and that being also closed, it could not be presented to him, and although it was not in banking hours, it was during the daytime and before the hours of rest.

When the note is payable at a bank, it is to be presented during banking hours; and the payer is allowed until the expiration of banking hours for payment. But when not to be made at bank, but to an individual, presentment may be made at any reasonable time during the day during what are termed business hours, which, it is held, range through the whole day to the hours of rest in the evening. (Parsons, 447, citing *Cayuga County Bank v. Hunt*, 2 Hill, 635; *Nelson v. Fotterall*, 7 Leigh, 194.)

And in the case of *Farnsworth v. Allen* (4 Gray, 453), a presentment made at 9 p. m. at the maker's residence, ten miles from Boston, when he and his family had retired, was held sufficient.

And in *Barclay v. Bailey* (2 Campb. 527) Lord Ellenborough sustained a presentment made as late as 8 p. m. at the house of a trader.

It is only where presentment is at the residence that the time is extended into the hours of rest. If it is at the place of business, it must be during such hours when such places are customarily open, or, at least, while some one is there competent to give an answer. (Parsons, 448.)

In this case there was no presentment to the maker, who could not be found, which, however, was unnecessary under section 2842 of the Code of Virginia. The protest was in due form, and duly protested, which was authorized by section 2849 of the Code, although the said note was payable at a bank in this state. And under section 2850 is *prima facie* proof of the facts stated therein, and is substantially in accordance with the finding of the jury. It therefore appears that such presentment as was requisite was made to the indorser and late manager of the bank, and that it was impossible to present the same at the bank named therein, as it had ceased to exist. We must, there-

fore, conclude that there has been sufficient diligence on the part of the plaintiff, and that the judgment of the court below in his favor was right, and should be affirmed.

Judgment affirmed.

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4. BY WAIVER.

§ 142

J. W. O'BANNON *v.* CURRAN.

129 APPELLATE DIVISION (N. Y.) 90. — 1908.

ACTION by the J. W. O'Bannon Co. against James M. Curran. A demurrer to parts of the complaint was overruled, and defendant appeals.

MCLAUGHLIN, J. — This appeal is from an interlocutory judgment overruling a demurrer to the second and third causes of action set forth in the complaint. In each case the demurrer was upon the ground that the facts stated did not constitute a cause of action. The second cause of action alleged is to recover upon a promissory note made by the James Freeman Brown Company, a domestic corporation, dated October 12, 1903, and payable three months after date to the plaintiff at 73 Franklin street, New York. It is alleged in substance, with reference to this cause of action, that the defendant indorsed the note, and it was then delivered, before maturity, to the plaintiff, which gave full value therefor, relying on the credit of said indorsement; that before the note became due, and on the 7th of December, 1903, an involuntary petition in bankruptcy was filed against the James Freeman Brown Company, and a receiver appointed; that on the same day the defendant, as president of the company, pursuant to a vote of the board of directors, filed a written admission of its inability to pay debts and a willingness that it be adjudged bankrupt; that it was so adjudged on the 20th of February, 1904; that at the maturity of the note the maker was insolvent, its business suspended, its place of business closed, its property still in the possession of the receiver, and that the note was not paid, of all which facts the defendant then had actual knowledge; that no part of the note has been paid, except a dividend declared in the bankruptcy proceedings, and that the balance is now due and owing to the plaintiff from the defendant, for which sum judgment is asked. The third cause of action alleged is on another note, and the allegations respecting it are substantially the same.

The appellant contends that no cause of action is stated against him as indorser upon the notes, because it does not appear that they were presented for payment and notice of nonpayment given to him. Prior to the enactment of the Negotiable Instruments Law (Laws 1897, p. 719, c. 612), it was held that an indorser of a note or the drawer of a draft was not discharged by an omission to demand payment and to

give notice of nonpayment, where such omission could not possibly operate to his injury, but such injury was presumed, until it was made to appear that no damage could have resulted; that mere proof of insolvency of the maker and drawer was not sufficient, and would not excuse the neglect. *Smith v. Miller*, 52 N. Y. 545; *Clift v. Rodger*, 25 Hun, 39; *Commercial Bank of Albany v. Hughes*, 17 Wend. 94; *Mechanics' Bank of N. Y. v. Griswold*, 7 Wend. 165. If this were to be here applied, then it is quite evident, under the facts alleged, the plaintiff would be entitled to recover, because the defendant was in no way prejudiced by the failure to present the notes for payment, or to give him notice of nonpayment. The Negotiable Instruments Law, however, provides that due presentment and notice of dishonor are necessary to charge an indorser (§§ 130-160); but either presentment for payment or notice of nonpayment may be dispensed with by waiver, which may be express or implied (§ 142, subd. 3; § 180); so that the real question here presented is whether the facts show such waiver.

I think they do. Prior to the maturity of the notes the maker had been adjudicated a bankrupt, and the adjudication was based at least in part upon the written admission of the defendant of its inability to pay debts, coupled with a willingness that it be adjudged a bankrupt. It is true the defendant signed this admission in his official capacity as president of the corporation, while he is only liable as indorser as an individual; but as an individual he knew when the notes fell due that the corporation could not pay them, because it had then been adjudicated a bankrupt and all of its property was in the hands of a receiver in the bankruptcy proceedings, in which he participated. Under such circumstances the defendant must be deemed to have waived, at least impliedly, within the meaning of the sections of the Negotiable Instruments Law above referred to, presentment of the notes and notice of dishonor. By his consent and with his co-operation it had been rendered impossible for the maker to pay—all of its property being then in *custodia legis*. This view is also sustained by what this court decided in *Moore v. Alexander*, 63 App. Div. 100. There Mr. Justice Ingraham, in considering the liability of an indorser where no presentation had been made, said:

“ \* \* \* It is only when, because of some act of the indorser, the nonpayment by the maker and a failure of notice to the indorser cannot possibly operate to the injury of the latter, that the omission is excused. The mere fact of insolvency of the maker is not enough. \* \* \* The fact which would excuse this presentation must, as I understand it, be some act in which the indorser participated, by reason of which the knowledge of the fact that the maker would not pay the bill could be of no benefit to him.”

When the notes in question fell due the maker could not pay. The indorser knew it, because he had participated in the act which made it

impossible for it to pay; and for that reason a failure to present the notes for payment and give him notice of nonpayment could not by any possibility have injured him.

The judgment appealed from, therefore, is affirmed, with costs, with leave to the defendant to withdraw demurrer and answer, on payment of costs in this court and in the court below. All concur.\*

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## V. Payment in due course.

See Article IX. — DISCHARGE OF INSTRUMENTS.

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\* See also *In re Swift*, 106 Fed. 65; *Baumeister v. Kuntz*, 53 Fla. 340; *Torbert v. Montague*, 87 Pac. (Colo.) 1145; *Gove v. Vining*, 7 Metc. (Mass.) 212, post, p. 580. Neg. Inst. Law, §§ 180-182. — C.

NEGOT. INSTRUMENTS — 34



## ARTICLE VIII.

### DUTIES OF HOLDER: NOTICE OF DISHONOR.

#### I. Notice necessary to charge drawer or indorser.

§ 160

LONG *v.* STEVENSON.

[Reported herein at p. 442.]<sup>1</sup>

§ 160

MARSHALL *v.* SONNEMAN.

216 PENNSYLVANIA STATE, 65. — 1906.

JUDGMENT for plaintiff, and defendant appeals.

MESTREZAT, J. — This is an action by an indorsee against an indorser to recover the balance due on a promissory note. One of the defenses interposed at the trial was an alleged failure to give the defendant notice of the dishonor of the note. The plaintiff proved the execution of the note by the maker, and introduced testimony to show that the defendant had indorsed it. A notary public was then called and he testified that he had protested the note at maturity for non-payment, and that on the same day he had delivered notices of protest personally to both the plaintiff and the defendant, who were the indorsers. \* \* \*

The defendant denied that he had received notice of the dishonor of the note. He testified that the notary delivered to him an envelope addressed to L. A. Marshall, the plaintiff, which contained the follow-

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<sup>1</sup> Notice of non-acceptance, whether presentment for acceptance be necessary or not (§ 240) must be given in case presentment for acceptance is in fact made, (§ 247). *Blesard v. Hirst*, 5 Burr. 2670; *Thompson v. Cumming*, 2 Leigh (Va.) 321; *Watson v. Tarpley*, 18 How. (U. S.) 517. The neglect is not cured by a subsequent presentment for payment followed by notice of dishonor. *Smith v. Roach*, 7 B. Mon. (Ky.) 17. But if the bill pass into the hands of a holder in due course after a dishonor by non-acceptance he may charge a drawer or indorser by a subsequent notice of dishonor for non-acceptance or non-payment. *Dunn v. O'Keeffe*, 5 M. & S. 282. See § 188. If after a note is overdue it is indorsed and transferred, the indorser is entitled to notice the same as the indorser of a note payable on demand. *Beer v. Clifton*, 98 Cal. 323. See *Leavitt v. Putnam*, 3 N. Y. 494, *ante*, p. 272.

The indorser of a non-negotiable note is not absolutely entitled to notice of dishonor, as his contract is that of guarantor. *Cromwell v. Hewitt*, 40 N. Y. 491; (cf. *Newman v. Frost*, 52 N. Y. 422); unless in jurisdictions where a guarantor is absolutely entitled to notice. *Sutton v. Owen*, 65 N. Car. 123. See *ante*, pp. 263-265. — H.

ing notice: "Notice of Protest. York, Pa., March 1, 1904. L. A. Marshall: Please take notice that the note of M. Fink for four thousand dollars in favor of A. Sonaman, dated York, Pa., Nov. 2, 1903, payable March 1, at L. A. Marshall & Co., Bankers, York, Penna., and by you endorsed (being due this day, payment having been demanded and refused), is protested for nonpayment, and that the holders look to you for the payment thereof. Respectfully yours, Henry K. Kraber, Notary Public." The defendant further testified that the notary gave him no other notice, paper or envelope. \* \* \*

If the holder of negotiable paper desires to charge antecedent parties with its payment, it is incumbent on him to give them notice of its dishonor. He may notify either or all of the prior indorsers, but he can compel payment only from those who have received notice of the maker's default. \* \* \*

Notice of nonpayment, however, is not sufficient; nor is mere knowledge of protest all that is required to charge the indorser. Says the author [Byles on Bills] above quoted (page 276): "Notice does not mean mere knowledge, but an actual notification. For a man who can be clearly shown to have known beforehand that the bill would be dishonored is, nevertheless, entitled to notice." In *Tindal v. Brown*, 1 Term Rep. 167, Ashhurst, J., says: "Notice means something more than knowledge, because it is competent to the holder to give credit to the maker. It is not enough to say that the maker does not intend to pay, but that the holder does not intend to give credit to such maker. The party ought to know whether the holder intends to give credit to the maker or to resort to him."

We are of opinion that the written notice which the defendant alleges was delivered to him was not sufficient to charge him with the dishonor of the note. It was in proper form, signed by a notary, and was delivered in due time. But on its face it clearly discloses the fact that it was not intended for the defendant. It was directed to L. A. Marshall, the plaintiff, and the envelope containing it bore the same address. Marshall, like the defendant, was also an indorser of the note, and, if the holder intended to impose liability on him, it was necessary that he should have notice of dishonor. It is therefore apparent that this notice was intended for Marshall, and was, of course, for the purpose of apprising him of the dishonor of the note, and was prepared by the notary with that intention. The notary does not testify that at the time he delivered the envelope containing the notice he told the defendant what it contained, or said anything to him concerning its contents. He did not apprise the defendant that the note had been dishonored or that the notice was intended for him. He gave the defendant no verbal notice whatever, and hence all the information the latter had of the dishonor of the note and the intention of the holder to guard his rights and to avoid responsibility by fixing liability on antecedent parties was what was contained in the envelope addressed

to Marshall. This, as we have observed, was a notice to Marshall that the note "by you indorsed" was protested for nonpayment, "and that the holders look to you for the payment thereof." Why should the defendant accept this as a notice of dishonor to him and take care of the note? There is no intimation in the paper that the holder intended to look to him for payment. On the contrary, the notice is that the holder will look to Marshall, his immediate prior indorser, for payment. This he had a legal right to do, and was not compelled to notify the defendant or any other indorser or to demand payment of him. If Marshall desired to hold the defendant responsible as a prior indorser it was incumbent upon him to give the latter notice of dishonor. The defendant was justified in treating the paper delivered to him by the notary as a notice to Marshall, as the address on the envelope and notice disclosed, and that the purpose was to notify Marshall of dishonor for the purpose of charging him with payment of the note. If either the envelope or the notice had been addressed to the defendant, or if neither had been addressed to him, the plaintiff's contention that the notice was for the defendant would have some ground for its support. If, when he delivered the paper, the notary had notified the defendant verbally that the note had been dishonored or that the written notice was for him, there would be sufficient to charge the defendant with notice of dishonor. But none of these facts can be found in the case. Assuming that the defendant opened the envelope and read its contents, he simply obtained the knowledge that the note was dishonored and that the holder would look to Marshall, the last indorser, for payment. This, as we have seen, is not sufficient under the cases to fix the defendant, as an indorser, for the payment of the note.

Judgment reversed, with a *venire facias de novo*.<sup>2</sup>

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<sup>2</sup> But see *Wilson v. Peck*, 66 Misc. (N. Y.) 179, where it was held that notice of dishonor erroneously addressed on its face to the maker but sent by mail to and received by the indorser is sufficient in the absence of proof that the indorser was misled thereby. WHITNEY, J., said:

"The first objection is that the notice was addressed on its face, by mistake, to the maker instead of the indorser. It described the note correctly. The envelope was correctly addressed and was personally received and opened by appellant. By section 166 of the Negotiable Instruments Law a misdescription of the instrument does not vitiate the notice, unless the party 'is in fact misled thereby.' This but states the law as previously settled. *Mills v. Bank of the United States*, 11 Wheat. 431; *Gates v. Beecher*, 60 N. Y. 518. By analogy, we think that the same rule should be applied where the instrument is misdirected instead of being misdescribed. *Carter v. Bradley*, 19 Maine 62. Whether *Marshall v. Sonneman*, 216 Penn. St. 65, where the misdirection was on the envelope as well as on the face of the notice, would be followed in this state, it is unnecessary to discuss. Appellant was a lawyer. He knew that he had indorsed a note for that maker for that amount, which was outstanding. He knew the notary and knew that the notary was the indorsee's attorney. He made no claim on the witness stand of having been misled." — C.

**II. What constitutes sufficient notice.****1. BY WHOM NOTICE MUST BE GIVEN.**

§ 161

**CHANOINE v. FOWLER.****3 WENDELL (N. Y.) 173. — 1829.****ACTION against drawer of a bill. Judgment for plaintiffs.**

By the Court, MARCY, J. — [After deciding that there was no sufficient proof that the protest in France, which did not conform to the rules of the law merchant, did conform to the rules of the French Commercial Code.]

To determine whether the defendant had legal notice of the non-acceptance of the bill, it will be necessary to see when it was given, and from whom it came. Messrs. Sewalls had transmitted the bill to France, and received information of its non-acceptance on the fourth or fifth of April. H. D. Sewall says he did not himself give notice thereof to the defendant, nor does he know that notice was given by his house; although it was their custom to give notice in such cases, and he has no doubt the defendant received it. He learned, from a conversation with the defendant between the time of receiving notice and on the 14th of April, that he had knowledge that the bill was dishonored. The judge, at the trial, ruled that if the defendant had notice in due time of the non-acceptance of the bill, it was no matter whence it came, it was available to the plaintiffs. The rule of law in relation to the notice was, I apprehend, laid down in a manner too broad and unqualified. The rule has heretofore fluctuated; but it never has been authoritatively stated, as I can find, to be as the judge laid it down on the trial, except in the case of *Shaw v. Coates*, at the sittings before Lord Kenyon, mentioned in Selwyn's N. P. 320, n. 25. Repeated decisions since, both in term and at *nisi prius*, have qualified and restricted the broad proposition of the judge in this case, and of Lord Kenyon in the case of *Shaw v. Coates*. In some instances, it has been decided that the holders or their agents are the only persons to give notice of the dishonor of bills; but it seems to be now settled that it is not absolutely necessary that the notice should come from the holder of a bill, but may be given by any person who is a party to it, and who would, on the same being returned to him, have a right of action on it. (*Chitty on Bills*, 229; 2 Campb. 373; 1 Stark. R. 29; *Bayley on Bills*, 161.) A notice from a mere stranger is not sufficient; and the charge of the judge was broad enough to sanction such a notice. For the insufficiency of the proof of the French Commercial Code and of the protest of the bill, and the misdirection of the judge as to the notice, a new trial ought to be granted.

New trial granted.<sup>3</sup>

<sup>3</sup> Notice by the maker is not sufficient. *Jagger v. National German-Am. Bank*, 53 Minn. 386. Nor by the drawee. *Stanton v. Blossom*, 14 Mass. 116. Nor by the acceptor. *Harrison v. Ruscoe*, 15 M. & W. 231. The contrary

## § 161

LYSAGHT *v.* BRYANT.

9 COMMON BENCH (C. P.) 46. — 1850.

ACTION by holder against drawer. Defendant drew the bill to his own order and indorsed it to L. & S., who indorsed it to plaintiff, but L. continued to hold it as plaintiff's agent. The bill was presented by L. and dishonored, whereupon L. & S. gave defendant notice in their firm name. Verdict for plaintiff. Defendant moves for a rule *nisi* to enter the verdict for the defendant.

MAULE, J. — I am of opinion that the notice of dishonor that was given in this case, was sufficient. Lysaght, the younger, appears to have acted as the agent of his father, the plaintiff. In that character, he received the bill from Lysaght & Smithett, by whom it was sworn to have been indorsed before it became due; and Lysaght the younger proved that it had ever since been kept by him amongst the documents which were held by him for his father. It was undoubtedly his duty to see that his father should have all proper remedies upon the bill. The bill, it seems, was presented on the day it became due, and was dishonored; and due notice of dishonor was given by Lysaght & Smithett to the defendant, as drawer. Lysaght, the younger, having due notice of the dishonor, which operated as a notice to Lysaght & Smithett, it was clearly competent to the latter, according to the decided cases, to give notice to all prior parties to the bill, and a notice so given would enure as a notice by the party who had given notice to them. I therefore think the defendant has had a sufficient notice of dishonor. \* \* \*

CRESSWELL, J. \* \* \* It seems, from the cases, that the holder of a bill may avail himself of a notice of dishonor given in due time by a prior indorsee, provided he himself is in a condition to sue the party by whom the notice was given. Here, Lysaght the younger, holding the bill as his father's agent, duly presented it, and had it returned to him dishonored. Notice of that fact to him, therefore, operating as a notice to the firm, the present plaintiff was entitled to sue them, and, consequently, is in a condition to avail himself of the notice of dishonor given by them to the defendant.

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doctrine has no foundation in principle, and may now be regarded as ended by the Neg. Inst. Law, wherever that is in force. See, however, 2 Daniel on Neg. Inst., § 990. — H.

["So far as I am able to discover, the doctrine of this case [*Chanoine v. Fowler*] has never been questioned, but has been distinctly approved. (See *Walmsley v. Acton*, 44 Barb. 312; *Lawrence v. Miller*, 16 N. Y. 235)."] MILLER, J., in *First Nat. Bk. v. Gridley*, 112 App. Div. (N. Y.) 398, 405.

"It is not enough that the indorser knew that the note had not been paid. The notice, to be effectual, must come from the legal source." DEWEY, J., in *Cabot Bank v. Warner*, 10 Allen (Mass.) 522, 525. — C.]

I find the rule thus laid down in Byles on Bills (5th ed., p. 214): "The object of notice is twofold; first, to apprise the party to whom it is addressed, of the dishonor; and, secondly, to inform him that the holder, or party giving the notice, looks to him for payment. (*Tindal v. Brown*, 1 T. R. 167.) Hence, it follows that notice can only be given by some party to the instrument, though he need not be the actual holder of the bill at the time (*Chapman v. Keane*, 3 Ad. & E. 193; 4 N. & M. 607; *Harrison v. Ruscoe*, 15 M. & W. 231; *Miers v. Brown*, 11 M. & W. 372); but that a stranger is incompetent to give it. (*Stewart v. Kennett*, 2 Campb. 177. *Vide tamen Abel v. Potts*, 3 Esp. N. P. C. 243.) And it has been held by Lord Eldon, that notice by the first indorsee, who had not himself received notice from the second indorsee, and who was not, therefore, obliged to take back the bill, was insufficient as between the second indorsee and the drawer. (*Ex parte Barclay*, 7 Ves. 597; but *quære*, since the case of *Chapman v. Keane*, *supra*.) And it seems clear, that even a party to the bill, who has been already discharged by *laches*, or who could not in any event sue, is incompetent to give notice. (*Harrison v. Ruscoe*, 15 M. & W. 231; *Miers v. Brown*, 11 M. & W. 372.) But a prior indorsee, who has himself received due notice, may transmit it. (*Jamesson v. Swinton*, 2 Campb. 373, 2 Taunt. 224; *Wilson v. Swabey*, 1 Stark. N. P. C. 34.) And notice by the holder, or by a party who is liable to be sued, and may be entitled to sue, will enure to the benefit of all antecedent or subsequent parties. So that a notice by the last indorsee to the drawer, will operate as a notice from each indorsee to the drawer; and, if the payee, or first indorsee, has duly received notice, a notice by him to the drawer will be equivalent to a notice from each indorser, and from the holder to the drawer. (Bayley on Bills, 209.) And a notice from an intermediate party may, in pleading, be described as a notice from the plaintiff. (*Newen v. Gill*, 8 C. & P. 367.) "

Rule refused.<sup>4</sup>

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<sup>4</sup> § 161-164. In *Chapman v. Keane* (3 Ad. & E. 193 — 1835), A indorsed the bill to B, who left it with A's clerk. The clerk presented it, and on dishonor notified the drawer in the name of A. A afterwards took up the bill from B, and brought action against the drawer. It was objected that the notice should have been in the name of B the holder. *Held*: That the notice was sufficient. The court employed the sweeping language, which has since given rise to some misapprehension, that "It is universally considered that the party entitled as holder to sue upon the bill may avail himself of notice given in due time by any party to it." This is properly qualified in the Neg. Inst. L., § 161.

In *Harrison v. Ruscoe*, (15 M. & W. 231 — 1846), A indorsed the bill to B who left it with C. C gave notice of dishonor to the drawer, but by mistake and without authority, in the name of A. Action by B against drawer. *Held*: Notice by A would be good under doctrine of *Chapman v. Keane*, (not, however, if A had been discharged by *laches* or had no right of action on the bill

## § 162

TRADERS' NATIONAL BANK *v.* JONES.

104 APPELLATE DIVISION (N. Y.) 433. — 1905.

APPEAL by the defendant from a judgment in favor of the plaintiff, and from an order denying the defendant's motion for a new trial made upon the minutes.

LAUGHLIN, J. — The action is brought to recover of the defendant, as indorser, the amount of two promissory notes and protest fees. The question presented for determination is whether the evidence shows as matter of law the giving of due notice of protest to the defendant. Both notes were made at Scranton, Pa., by the co-partnership firm of C. F. Beckwith & Co. of that city. They were payable to the order of the defendant, indorsed by him, and then indorsed by the makers and delivered to the plaintiff before maturity at whose bank they were payable. \* \* \*

The notary gave due and timely notice of protest to the defendant's firm, who were both makers, and in form at least, subsequent indorsers. If the plaintiff had alleged that the defendant was a member of the firm I am of opinion that he would be chargeable with notice of the dishonor and with the notice given to his firm as indorsers (*Gowan v. Jackson*, 20 Johns. 176; *Halliday v. McDougall*, 22 Wend. 264, 272; see, also, Neg. Inst. Law, §§ 170–185–186); but this was not pleaded, and, since it was not an issue, there is no justice or propriety in seizing upon this item of evidence, although admitted without objection that it was not pleaded, for the purpose of holding the defendant. The verdict should stand or fall upon the issues as tried. The notice to the firm, however, was received either on the day the note fell due or on the morning of the day following. With it came under separate cover, addressed to the defendant, care of the firm, a formal notice of protest by the notary in behalf of the plaintiff directed to the defendant, and the firm were requested to forward the same to him. Mr. Beckwith testified that immediately upon receiving this notice he inclosed it in an envelope and addressed it to the defendant at his regular place for receiving mail in the city of New York, which was in the care of his counsel on this appeal. \* \* \*

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if he had taken it up); notice by C in A's name is good since, though unauthorized, the drawer is not injured.

In *Jennings v. Roberts*, (4 E. & B. 615 — 1855), A indorsed the bill to defendant and defendant to plaintiff. Plaintiff knew the acceptor had stopped payment, and probably would not pay. On the day after maturity, without knowing whether the bill (which was payable at a distance) had actually been dishonored, plaintiff told defendant it had been dishonored, and he should look to defendant. *Held*: Notice sufficient. "If a bill is dishonored in fact, and a party to the bill unequivocally asserts that fact in a notice of dishonor, I think you cannot inquire into the state of the party's mind, or his means of knowledge." — H.

Although it presumptively appears from the face of the notes and the indorsements that the defendant was an accommodation indorser for the makers (*Smith v. Weston*, 159 N. Y. 194; *Nat. Park Bank v. German American M. W. & S. Co.*, 116 N. Y. 281), and, therefore, would not be liable to them and consequently they could not in their own behalf give him a valid notice of protest (Neg. Inst. Law, § 161; *Cabot Bank v. Warner*, 10 Allen (Mass.) 522; *Harrison v. Ruscoe*, 15 M. & W. 231; *Stanton v. Blossom*, 17 Mass. 116, 120; Story, Prom. Notes, 7th Ed., § 303), yet they could on behalf of the bank and as its agents give the notice by forwarding it immediately as was done. (Neg. Inst. Law, §§ 162–163; *Sewall v. Russell*, 3 Wend. 276; *Chanoine v. Fowler*, 3 Wend. 173; *Lawrence v. Miller*, 16 N. Y. 235; *Smith v. Poillon*, 87 N. Y. 590; *Eagle Bank v. Hathaway*, 5 Metc. (Mass.) 212; *Rowe v. Tipper*, 13 C. B. 249; *Chapman v. Keane*, 3 Ad. & El. 193; *Lysaght v. Bryant*, 19 L. J. C. P. 160).

It follows, therefore, that the judgment and order should be affirmed, with costs.

INGRAHAM and McLAUGHLIN, JJ., concurred; PATTERSON, J., concurred in result; VAN BRUNT, P. J., dissented.

Judgment and order affirmed, with costs.

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## § 163

## STAFFORD v. YATES.

18 JOHNSON (N. Y.) 327. — 1820.

ACTION by second indorser against first indorser. Defense, want of notice. Judgment for plaintiff.

The note was indorsed for the accommodation of the maker. It was discounted at bank, and on dishonor at maturity due notice was given by the agent of the bank to both indorsers. No notice was given by plaintiff to defendant. Plaintiff took up the note.

PER CURIAM. — We see no ground to doubt the correctness of the decision at the circuit. Upon authority, as well as sound reason, it is sufficient that the first indorser had notice from any subsequent holder of the note, of the default of the maker, and that he would be looked to for payment; provided such notice were given immediately after such default. The only object in requiring notice is, that such indorser may have recourse to the maker, to indemnify himself. And whether, after such notice, the first indorser be sued by the second, or third indorser, is immaterial; and notice of nonpayment, etc., from either of them, enures to the benefit of all who stand behind him on the note.

Judgment for the plaintiff.



## § 165 OHIO LIFE INSURANCE AND TRUST CO. v. M'CAGUE.

18 OHIO, 54. — 1849.

ACTION against drawer of a bill payable to his own order and indorsed by him to plaintiff and by plaintiff to its agent in New York. Judgment for plaintiff.

SPALDING, J. — There are really but two questions presented in this case for our consideration: First. Was the notice of protest for non-payment transmitted with sufficient diligence and directness to the defendant?

The bill matured and went to protest on the 19th day of June, 1846. It was then in the hands of an agent of the plaintiff in the city of New York. Admit that agent to have been the actual cashier of the "Trust Company." He was then attending to an agency in the City of New York, and so far as it concerned the bill in question, which was discounted at the bank in Cincinnati and sent to him in New York for collection, he may as well be called an agent as any indifferent person. This agent, on the very next day after the protest in New York, sent the notice by mail to his principal in Cincinnati, where it arrived on the 25th of June, and on the same day was again placed in the mail, directed to the defendant at Ripley. The most stringent rules of the law merchant will require no more than this. The whole objection of counsel is based upon the fanciful idea that the Ohio Life Insurance and Trust Company at Cincinnati was embodied in the person of its cashier, Wm. M. Vermilye, in the City of New York; and that it was sending the notice of protest from itself in New York to itself in Cincinnati. We are not inclined to indulge in subtleties of this sort, and hold that Mr. Vermilye in New York, whether he be called agent or cashier, was employed by the holder of the bill in Cincinnati to present the same for payment; and, on payment being refused, to return it in due time, with the ordinary notice of protest, to his employer in Cincinnati, whose duty it would be to communicate with the other parties to the bill.

[Omitting a question of statutory construction.]

Judgment affirmed.<sup>5</sup>

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<sup>5</sup> Accord: *Howard v. Ives*, 1 Hill (N. Y.) 263; *Church v. Barlow*, 9 Pick. (Mass.) 547; *Renshaw v. Triplett*, 23 Mo. 213.

It has recently been held by the English Court of Appeal (Collins, L. J., dissenting), that where a bill is forwarded by the A. Branch of the X Bank, due notice to the B. Branch of the same bank is sufficient to satisfy sec. 49 subsec. (12) and (13) of the Bills of Exchange Act, since the X Bank is the principal, and not a particular branch of that bank. *Fielding & Co. v. Corry*, [1898] 1 Q. B. 268. These provisions are substantially the same as § 165, and § 175 of the Neg. Inst. Law. — H.

## 2. FORM OF NOTICE.

## § 166

## KING v. HURLEY.

85 MAINE, 525. — 1893.

EMERY, J. — This was an action by an indorsee against the indorser of a promissory note. At the maturity of the note, payment was duly demanded of the maker, and was refused, and notice thereof was seasonably sent to the defendant indorser. The defendant makes but two objections to the notice. First, that it did not state who were the other indorsers of the note. Second, that it misstated the amount of the note.

The defendant, however, does not show that he was in the least misled or confused by the omission, or by the mistake. On the contrary, it clearly appears that he understood the notice to refer to the note in suit. He was, therefore, fully informed of the dishonor of this note and that the holder looked to him for payment. This was sufficient to fix his liability. (*Cayuga Co. Bank v. Warden*, 1 N. Y. 413; 6 N. Y. 19.)

Exceptions overruled.\*

## § 167

## MILLS v. BANK OF UNITED STATES.

11 WHEATON (U. S.) 431. — 1826.

ACTION against indorser on a note dated 20 July, 1819, payable 60 days after date at the office of discount and deposit of the Bank of the United States, at Chillicothe. The following notice of dishonor was sent to the indorser:—

CHILICOTHE, 22nd September, 1819.

Sir, You will hereby take notice, that a note drawn by Wood & Ebert, dated 20th day of September, 1819, for 3,600 dollars, payable to you, or order, in sixty days, at the office of discount and deposit of the Bank of the United States at Chillicothe, and on which you are indorser, has been protested for non-payment, and the holders thereof look to you.

Yours respectfully,

LEVIN BELT,

Mayor of Chillicothe.

PETER MILLS, Esq.

MR. JUSTICE STORY (after stating the facts) delivered the opinion of the court.

The first point is, whether the notice sent to the defendant at Chillicothe, was sufficient to charge him as indorser. The court was of opinion, that it was sufficient, if there was no other note payable in the office at Chillicothe, drawn by Wood & Ebert, and indorsed by the defendant.

\* See also *Sussex Bank v. Baldwin*, 17 N. J. L. 487, ante, p. 480. — H.

It is contended, that this opinion is erroneous, because the notice was fatally defective by reason of its not stating who was the holder, by reason of its misdescription of the date of the note, and by reason of its not stating that a demand had been made at the bank when the note was due. The first objection proceeds upon a doctrine which is not admitted to be correct; and no authority is produced to support it. No form of notice to an indorser has been prescribed by law. The whole object of it is to inform the party to whom it is sent, that payment has been refused by the maker; that he is considered liable; and that payment is expected of him. It is of no consequence to the indorser who is the holder, as he is equally bound by the notice, whomsoever he may be; and it is time enough for him to ascertain the true title of the holder, when he is called upon for payment.

The objection of misdescription may be disposed of in a few words. It cannot be for a moment maintained, that every variance, however immaterial, is fatal to the notice. It must be such a variance as conveys no sufficient knowledge to the party of the particular note which has been dishonored. If it does not mislead him, if it conveys to him the real fact without any doubt, the variance cannot be material, either to guard his rights or avoid his responsibility. In the present case, the misdescription was merely in the date. The sum, the parties, the time and place of payment, and the indorsement, were truly and accurately described. The error, too, was apparent on the face of the notice. The party was informed that on the 22d of September, a note indorsed by him, payable in sixty days, was protested for non-payment; and yet the note itself was stated to be dated on the 20th of the same month, and, of course, only two days before. Under these circumstances, the court laid down a rule most favorable to the defendant. It directed the jury to find the notice good, if there was no other note payable at the office at Chilicothe, drawn by Wood & Ebert, and indorsed by the defendant. If there was no other note, how could the mistake of date possibly mislead the defendant? If he had indorsed but one note for Wood & Ebert, how could the notice fail to be full and unexceptional in fact?<sup>7</sup>

The last objection to the notice is, that it does not state that payment was demanded at the bank when the note became due. It is certainly not necessary that the notice should contain such a formal allegation. It is sufficient that it states the fact of nonpayment of the note, and that the holder looks to the indorser for indemnity. Whether the demand was duly and regularly made, is matter of evidence to be established at the trial. If it be not legally made, no averment, however accurate, will help the case; and a statement of non-

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<sup>7</sup> Followed in *Derham v. Donohue*, 155 Fed. 385, reported in 12 A. & E. Am. Cas. 372, with note entitled "Effect of misstatement in notice of protest as to time of dishonor." — C.

payment and notice, is, by necessary implication, an assertion of right by the holder, founded upon his having complied with the requisitions of law against the indorser. In point of fact, in commercial cities, the general, if not universal, practice is, not to state in the notice the mode or place of demand, but the mere naked nonpayment.

Upon the point, then, of notice, we think there is no error in the opinion of the Circuit Court.

[The court then decides that a usage to demand payment on the fourth day of grace, is good, and some other points immaterial here.]

Judgment affirmed.<sup>8</sup>

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### § 167 SALOMON v. PFEISTER & VOGEL LEATHER CO.

31 ATLANTIC REPORTER (N. J.) 602. — 1895.

ACTION against indorser. Judgment for plaintiff.

VAN SYCKEL, J. — The only question which it is deemed necessary to discuss in this case is whether a notice of protest must contain an express statement that the holder of the protested note will look to the indorser for payment. This question was before our Supreme Court in *Burgess v. Vreeland* (24 N. J. Law, 71), in which case there was a failure to state in the notice that the holder looked to the indorser for payment. The chief justice in deciding the case said: "The object of the notice is to apprise the indorser that the note is dishonored, and that he is looked to for payment. It is not necessary to state, in terms, that the holder looks to the indorser for indemnity. It is enough if that fact appears by just and natural implication. The modern cases agree that the fact of giving notice to the indorser that the note is dishonored for nonpayment is in itself a sufficient notice that the indorser is looked to for payment." Many authorities supporting this rule are cited in the opinion. In the later case of *Howland v. Adrian* (30 N. J. Law, 41) the rule recognized was that the notice must be sufficient to inform the party, either in express terms or by necessary implication, that the bill or note had been dishonored, and that he was looked to for payment. In the case in hand the notice mailed to the indorser stated that payment of the note had been duly

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<sup>8</sup> An omission or misdescription of the maker's name may render the notice ineffectual. *Home Ins. Co. v. Green*, 19 N. Y. 518; *McGeorge v. Chapman*, 45 N. J. L. 395. But not, it seems, if the indorser is not misled thereby. *Howland v. Adrian*, 30 N. J. L. 41; *Hodges v. Shuler*, 22 N. Y. 114.

Where the notice may apply to any one of two or more notes indorsed by the defendant, the notice may be ineffectual. *Cook v. Litchfield*, 9 N. Y. 279. But not, it seems, if the indorser is not misled thereby. s. c., (on retrial), 2 Bosw. (N. Y.) 137.

It is unnecessary that the notice should include a copy of the protest. *Dennistoun v. Stewart*, 17 How. (U. S.) 606, *post*. — H.

demand of the maker, that payment was refused, and that the note was protested for non-payment. The only inference which the indorser could reasonably have drawn from such a notice was that the holder of the note intended to look to him for payment. The liability of the maker to the holder was fixed without presentment and protest, and therefore the only purpose which the holder could have had in sending such notice was to charge the indorser. The notice in this case was, in my opinion, sufficient, and the judgment below should be affirmed.<sup>9</sup>

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### 3. MODE OF NOTICE.

#### (a) *Personal delivery.*

### § 167

### HOBBS v. STRAINE.

149 MASSACHUSETTS, 212. — 1889.

ACTION against indorser. Verdict for plaintiff.

MORTON, C. J. — Notice of the dishonor of a note is sufficient to charge an indorser if it is delivered to him personally, or is left at his place of residence or of business, or is deposited in the mail addressed to him at his place of residence or of business, the postage being prepaid. (Pub. Sts., c. 77, § 16; *Bank of America v. Shaw*, 142 Mass. 290; *Importers & Traders' National Bank v. Shaw*, 144 Mass. 421.) The underlying principle of all the decisions upon the subject is, that reasonable diligence must be used by the holder in getting notice of the dishonor to the indorser.

In the case at bar, the evidence tended to show that the plaintiffs, in due time, took a written notice of the dishonor, addressed to the defendant, to his office, which was his place of business, and, finding no one in, left it there. The precise place in the office where it was left was not fixed with certainty, and the court instructed the jury, that, if they found that it was left in a conspicuous place in the office, it was a sufficient notice. This ruling was correct. The jury might well find that the notice was left in good faith in the defendant's office, in such way that he would be likely to see it when he came in. Such a mode of giving the notice would ordinarily be as effectual as if it were sent by mail through a letter carrier. We think the evidence shows a compliance with the rule of law requiring the holder to exer-

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<sup>9</sup> An indication of dishonor: "Has not been paid and I request (or demand) payment." *Arnold v. Kinloch*, 50 Barb. (N. Y.) 44; *Page v. Gilbert*, 60 Me. 485; *Armstrong v. Thurston*, 11 Md. 148; *Pinkham v. Macy*, 9 Met. (Mass.) 174. — H.

cise reasonable diligence, and that the notice was sufficient to charge the defendant as indorser.

[Omitting question as to waiver.]

Exceptions overruled.<sup>1</sup>

(b) *Mail delivery.*

§ 167

SHELDON v. BENHAM.

4 HILL (N. Y.) 129. — 1843.

ACTION against indorser. Note payable in Geneva. Holder and indorser reside in Penn Yan. Note dishonored in Geneva; notices sent by mail from Geneva to holder in Penn Yan; holder deposits notice for indorser in Penn Yan postoffice. Indorser asks nonsuit on the ground that leaving the notice in the postoffice at Penn Yan, there being no evidence that the defendant received it, was insufficient. Motion for nonsuit denied. Verdict for plaintiff.

*By the Court*, BRONSON, J. — It seems to have been assumed on the trial that Babcock owned the note, and sent it to the bank, where it was made payable, for collection. Notice was sent to Babcock, the last indorser, with notices for the other indorsers; and if he was not mistaken as to the proper mode of service, he gave notice to the defendant Benham on the same day or the day after he received advices from the bank. Either day was sufficient. (*Howard v. Ives*, 1 Hill, 263; *Bank v. Davis*, 2 Id. 451.) But as Babcock and the defendant, Benham, lived in the same village, I think the service should have been personal, or by leaving the notice at the dwelling house or place of business of the indorser, and that service through the postoffice was not sufficient. The postoffice is not a place of deposit for notices to indorsers, except where the notice is to be transmitted by mail to another office. (*Ransom v. Mack*, 2 Hill, 587.) None of our cases have gone further than that.

New trial granted.<sup>2</sup>

<sup>1</sup> Notice at a place of business may be left with any person in charge. *Bank v. Mudgett*, 44 N. Y. 514; *Merz v. Kaiser*, 20 La. Ann. 377. So, also, as to notice at the residence of the indorser. *U. S. Bank v. Hatch*, 6 Pet. (U. S.) 250; *Blakely v. Grant*, 6 Mass. 386; *Bradley v. Davis*, 26 Me. 45; *Howe v. Bradley*, 19 Me. 31. Notice by telephone to be effective must be shown to have actually reached the indorser. Usually it would be necessary to show that the person responding was the indorser himself. *Thompson, etc., Co. v. Appleby*, 5 Kan. App. 680, 48 Pac. Rep. 933. See also *Stewart v. Eden*, 2 Caines (N. Y.) 121, *post*, p. 540; *Adams v. Wright*, 14 Wis. 408, *post*. — H.

<sup>2</sup> NOTICE BY MAIL. In the absence of statute the mail cannot be used as a place of deposit but only as a means of transmission. *Ian Vechten v. Pruyn*, 13 N. Y. 549. This rule was changed by statute in New York by L. 1857, c. 416; but the statute does not abridge the right of the indorser to designate

## § 176

STATE BANK *v.* SOLOMAN.

84 SUPPLEMENT (N. Y. SUP. CT., APP. T.) 976. — 1903.

FREEDMAN, P. J. — This action was upon a promissory note, and the only issue litigated at the trial was whether or not notice of the dishonor of the note was given and received. Proof that such notice was duly addressed and deposited in the postoffice in a postpaid wrapper was adduced by the plaintiff. The court charged the jury that the only question for them to decide was whether the defendant received notice of the presentation and protest of the note. "If he did," said the court, "your verdict will be in favor of the plaintiff; otherwise it will be in favor of the defendant. It is the duty of the plaintiff to establish by the weight and preponderance of evidence that a notice of presentation and protest of this note was served upon the defendant in this action." The plaintiff's counsel thereupon asked the court to charge the jury "that it is not necessary for an indorser to receive a notice of protest. The mere deposit of a notice in a postpaid wrapper in the postoffice of New York City is sufficient." To this request the court responded: "It is not sufficient. It is *prima facie* evidence of the facts stated by the witnesses." To this ruling the plaintiff's counsel duly excepted. The jury rendered a verdict in favor of the defendant, and the plaintiff now appeals.

This ruling of the court was in direct conflict with section 176 of the Negotiable Instruments Law (Laws 1897, p. 741, c. 612). That section provides: "Where notice of dishonor is duly addressed and deposited in the postoffice, the sender is deemed to have given due notice, notwithstanding any miscarriage in the mails." The testimony of the plaintiff's witnesses as to the addressing, mailing, etc., of the notice was undisputed. If the jury believed that testimony,

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the particular address to which the notice shall be sent. *Bartlett v. Robinson*, 39 N. Y. 187 (1868). Independent of statute it has been held that where the indorser resides outside the corporate limits of the town where the instrument is dishonored and is in the habit of receiving his mail there, the post-office may be used as a place of deposit in order to relieve the holder of the burden and expense of sending a messenger. *Bank of Columbia v. Lawrence*, 1 Pet. (U. S.) 578 (1828); *Barret v. Evans*, 28 Mo. 331; *Bell v. State Bank*, 7 Blackf. (Ind.) 456; but the contrary has also been maintained. *Forbes v. Omaha Nat. Bk.*, 10 Neb. 338 (1880); *Brown v. Bank of Abingdon*, 85 Va. 95 (1888). If such notice is actually received in due time it is unquestionably good. *Phelps v. Stocking*, 21 Neb. 443 (1887). Where there is a letter carrier delivery at offices and residences the mail may be used though the indorser reside in the place where the instrument is dishonored, for in such case the mail is used for transmission and not for deposit. *Shoemaker v. Mechanics' Bank*, 59 Pa. St. 83 (1868); *Walters v. Brown*, 15 Md. 285 (1859); but in such case a deposit of a notice not addressed to a street and number has been held not within the rule. *Benedict v. Schmieg*, 13 Wash. 476 (1896). By the statute above, notice by deposit is now sufficient. See § 174, subsec. 3, *post.* — H.

whether the defendant received such notice is not material. The court should have so charged. To refuse so to charge constituted reversible error, for which a new trial must be granted.

Judgment reversed, and new trial ordered, with costs to the appellant to abide the event. All concur.<sup>3</sup>

## § 177

## PEARCE v. LANGFIT.

101 PENNSYLVANIA STATE, 507. — 1882.

ACTION against indorser. Holder handed notice duly addressed and stamped to a United States mail carrier, who was then in the bank to deliver mail. Judgment for plaintiff.

MR. JUSTICE GREEN delivered the opinion of the court, December 30th, 1882.

We think the delivery of a letter to an official letter carrier is the full equivalent for depositing it in a receiving box or at the postoffice. When left in the former it is for the purpose of being taken therefrom by the carrier, and if left at the postoffice it must be taken from the receptacle there provided for its deposit, either by the postmaster or by some one of his agents, to be placed in the mail. In either case the letter must come into the personal custody of some one lawfully authorized for the purpose, whose function it is to participate in the transmission of it from the sender to the mail.

It certainly can make no difference whether the letter is handed directly to the carrier, or is first deposited in a receiving box and taken from thence by the same carrier. In the case of *Skilbeck v. Garbett* (7 Ad. & El. N. S., p. 846), in which the very point was decided, Lord Denman, C. J., said: "If a public servant belonging to the postoffice, takes charge of the letter in the exercise of his public duty, it is the same as if it were carried to the office." The postal regulations of the United States require that carriers while on their rounds shall receive

<sup>3</sup> "Prior to the enactment of the Negotiable Instruments Law, if notice of protest was sent by a letter, prepaid, properly addressed, and deposited in the post-office, there was a presumption that it reached its destination by due course of mail, but the presumption could be rebutted by evidence showing that it was not received, and when such evidence was produced, it was a question of fact for the jury: *Jensen v. McCorkell*, 154 Pa. 323. Section 105 [N. Y., § 176] has changed the former law on this subject by providing that 'where notice of dishonor is duly addressed and deposited in the post-office, the sender is deemed to have given due notice, notwithstanding any miscarriage in the mails.' Under this section due notice of dishonor is deemed to have been given when it is shown that the notice is properly addressed and deposited in the post-office, whether it has been received or not. In other words, the purpose and effect of this section of the act were simply to protect the sender of the notice against miscarriage of the mails." *MESTREZAT, J., in Zollner v. Moffitt*, 222 Pa. St. 644, 651. — C.



all letters prepaid that may be handed to them for mailing. It follows that when such a carrier receives a prepaid letter from a citizen for the purpose of being mailed, he is in the strict performance of his official duty.

[Omitting other questions.]

Judgment affirmed.<sup>4</sup>

#### 4. TO WHOM NOTICE MAY BE GIVEN.

§ 169

STEWART *v.* EDEN.

2 CAINES (N. Y.) 121. — 1804.

ACTION against executor of indorser. Shortly after the note was indorsed the indorser removed to his country residence and there died. His will was not proved until after the maturity of the note. At its maturity the holder, upon dishonor, sent a messenger with a notice of dishonor, directed to the indorser, to the town house of the indorser, but, as it was closed, the notice was rolled up and put into the keyhole of the door.

LIVINGSTON, J., delivered the opinion of the court. \* \* \*

Ought notice of the maker's default to have been sent to the indorser's country house? The note being dated in New York, the maker and indorser are presumed to have resided, and contemplated payment, there. It is admitted, indeed, that the indorser did reside in the city at the time of its date, for it is stated that shortly thereafter he went to his country seat, shutting up his house in town. We must take care that, while proper diligence be imposed on the holder of negotiable paper, we do not exact from him every possible exertion that might have been made to affect an indorser with knowledge of its being dishonored. If he has done all that a diligent and prudent man could

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<sup>4</sup> "The deposit of the notice in a post-office box on the street was just the same, in legal effect, as if it had been deposited in a box at the post-office. (*Skilbeck v. Garbett*, 7 Q. B. 846; *Pearce v. Langfit*, 101 Penn. St. 507)." — *Johnson v. Brown*, 154 Mass. 105 (1891). Accord: *Casco Nat. Bk. v. Shaw*, 79 Me. 376; *Wood v. Callaghan*, 61 Mich. 402.

["The attorney testifies that he put it [the notice of protest] in the mail chute on the day of protest. . . . The chute was a letter box under the control of the Post-Office Department, and therefore equivalent to the post-office itself. Negotiable Instruments Law, § 177." *Wilson v. Peck*, 66 Misc. 179, 180. — C.]

The notarial certificate need not state that the address to which the notice is sent is the correct residence or address. In the absence of evidence to the contrary, the presumption is that the notary, who is a public officer, has correctly stated the address. *Legg v. Vinal*, 165 Mass. 555, citing contrary holdings. As to sufficiency of notarial certificate as evidence of notice, see *post*. pp. 589–590. — H.

[See also *Adams v. Wright*, 14 Wis. 408, *post*, p. 548. — C.]

naturally and fairly do under like circumstances; if the law has prescribed no certain way of sending a notice in the given case; if the indorser's own conduct has rendered it somewhat difficult to determine in what way the notice ought to be given; and especially, if from what has been done, it may reasonably be presumed that notice has reached the parties concerned, we should be satisfied, and not ask for more. Indorsers, therefore, cannot complain, if notices of this nature are permitted to be left at their houses in town notwithstanding their removal into the country during the hot months. It is more reasonable that they leave a person in town to attend to their business, than that the holders of their paper be put to the trouble of finding out to what part of the country they have removed and sending after them. It is also probable, especially when the distance between the two houses is only four miles, as it was here, that some communication will be kept up between them, and that a letter left at the dwelling in town will not be long in finding its way to the country. I speak now of a temporary residence in the country; for a permanent removal from the city might render a different course necessary. Nor was it fatal to direct the notice to the indorser himself; for as it was not known whether he had made a will, nor who his executors were, until long after, it was full as probable that it would reach the parties interested by this address as by any other; some one of the deceased's family would either open it, or see it safely delivered to an executor. The notice, therefore, was well served, and its address proper.<sup>5</sup>

[Reversed on a point of pleading.]

## § 170

## DABNEY *v.* STIDGER.

12 MISSISSIPPI, 749. — 1840.

ACTION against administrator of indorser. Indorsement by Thomas & Dabney, partners. Notice to Thomas, surviving partner. Holder knew of Dabney's death and that the partnership was thereby dissolved. Judgment for plaintiff.

MR. JUSTICE TURNER delivered the opinion of the court.

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<sup>5</sup> "When the indorser is dead and there are no personal representatives, or none can be discovered by reasonable diligence, then notice of dishonor should be addressed to the indorser at his last place of abode. (*Stewart v. Eden*, 2 Cai. 121; *Merchants' Bank v. Birch*, 17 Johns. 25; *Linderman's Executors v. Guldin*, 34 Pa. St. 54; *Edw. Bills & N.* 631; *Dan. Neg. Inst.*, § 1001.) But when there are personal representatives and they are known or discoverable by due diligence, then notice must be given to them. (*Oriental Bank v. Blake*, 22 Pick. 206; *Smalley v. Wright*, 11 Vroom, 471; *Story, Prom. N.*, § 310; *Edw. Bills & N.* 631; *Dan. Neg. Inst.*, § 1000; *Chit. Bills*, 295)." — *Dodson v. Taylor*, 56 N. J. L. 11, 19. — H.

The only question raised in this case is whether the executor or administrator of a deceased partner is entitled to notice of the non-payment of a note indorsed by the partners as such.

The authorities are clear, and are believed to be uniform, that notice to one is notice to all. (Bayley on Bills, 285; 1 Con. R. 368; 4 Cow. 126; 6 Louisiana, 684; 3 Litt. 251.)<sup>6</sup> But it must appear that they are partners. In this case it so appears. Persons being joint payees of a note, who severally indorse it, are entitled each to notice of non-payment.<sup>7</sup> They being joint, does not necessarily constitute them partners. The act of assembly relied on by the appellant, found in Statute Laws of Mississippi, H. & H., 595, merely affects the remedy and not the right, and was passed to facilitate creditors in obtaining judgment for their just demands against one or all of several partners.<sup>8</sup>

## § 172 MORELAND'S ADMINISTRATOR v. CITIZENS' SAVINGS BANK.

[Reported herein at p. 696.]

### 5. TIME WITHIN WHICH NOTICE MUST BE GIVEN.

(a) *Where parties reside in same place.*

## § 174

### ADAMS v. WRIGHT.

14 WISCONSIN, 408. — 1861.

THIS was an action against Wright as indorser of a promissory note, payable at the Bank of Oshkosh. The note was protested for nonpayment, and the complaint alleged that due notice of protest and nonpayment was given to the defendant; which allegation was denied by the answer.

<sup>6</sup> Accord: *Hubbard v. Matthews*, 54 N. Y. 43; *Fourth N. B. v. Heuschen*, 52 Mo. 207. — H.

[In *Feiganspan v. McDonnell*, 201 Mass. 341, it was held that where the indorsement on a promissory note is in the name of a copartnership, by the express provisions of R. L. c. 73, § 116 (N. Y. Neg. Inst. Law. § 170), notice to one of the partners of the dishonor of the note "is notice to the firm, even though there has been a dissolution." — C.]

<sup>7</sup> Accord: *Willis v. Green*, 5 Hill (N. Y.) 232; *Shepard v. Hawley*, 1 Conn. 367. — H.

<sup>8</sup> If notice is given to a bankrupt before a trustee or assignee is appointed it must, of course, be given to him personally. *Ex parte Moline*, 19 Ves. 216. If given after the appointment of the trustee it may be given to the bankrupt or to the trustee. *In re Bellman*, L. R. 4 Ch. D. 795; *Callahan v. Kentucky Bank*, 82 Ky. 231; [*Moreland's Administrator v. Cit. Sav. Bank*, 114 Ky. 577, *post.* — C.]; *American N. B. v. Junk Bros.*, 94 Ky. 624, *post.*, p. 579. — H.

endeavoring, by the oral testimony of the notary, to fortify the case made by the record, the plaintiff should, as afterwards happened in this action, call forth facts which tend to disprove it and to falsify the certificate, it would become a question of veracity between the notary as a witness upon the stand, and as a public officer acting under the sanctity of an official oath, to be settled by the jury. He being a competent witness, and the certificate being open to explanation and contradiction, it is, of course, possible for him to dispute it, and if he does, the jury must weigh his account on oath against the official document under his seal, and determine between them. This was so held under a similar statute of Pennsylvania, in the case of *Stewart v. Allison*, 6 Serg. & Rawle, 324. That case, indeed, goes much further, and sanctions a doctrine which the facts of this do not present. The majority of the court held that the protest of the notary under his official seal was competent evidence to go to the jury, notwithstanding he was produced as a witness and testified positively that he had no knowledge whatever of the transaction, and that the protest was written and sealed by his son, who acted as his clerk or agent, and who said he had given the notice. The dissenting opinion of Gibson, J., is a powerful argument against its admissibility in such a case, and the Supreme Court of New York, in *Onondaga County Bank v. Bates*, 3 Hill, 53, under a statute like ours, held that the office of notary was one of personal trust and confidence, and that its duties could not be performed by a clerk or third person. It seems obvious from the nature of his duties and the provisions of the statute, that his official oath is substituted for the ordinary judicial oath taken in the presence of the court and jury, and that he cannot lawfully and conscientiously certify or record as matters of fact things which he would be incompetent to testify to as a witness if called to the stand in the trial of a cause, and which would be excluded as mere hearsay. Still, we think the reasoning of the majority of the court in *Stewart v. Allison* applicable to a case like this, where the notary does not directly deny a knowledge of the facts stated in his certificate, but only by inference and by testifying to circumstances which, though not absolutely inconsistent with them, tend to draw them into doubt and remove their effect. They say that the jury may possibly give more credit to the official certificate than to the oath of the notary; that he may have been tampered with after giving his certificate; or the jury may think that the certificate and parol evidence are not inconsistent, or that he may be mistaken after the lapse of many years, or confound one transaction with another.

The record of the notary was properly admitted. The objection taken to it was, that the certificate which had been already introduced, showed no service upon the defendant, personally or otherwise, of the notice of which it purported to contain a copy. So far as the objection was founded on the supposed requirement of the statute, that notice

I gave him the notice, and asked him to hand it to his father; he turned and went towards the house; I did not see him go in, as I could not see the door from where I stood; this was between the gate and the front door."

The defendant requested the court to instruct the jury as follows: "1. Unless the jury find from the evidence that the notice of protest was personally served on the defendant, the plaintiff cannot recover. 2. Leaving notice at his house was not a personal service, unless it was left with some member of the family to whom its contents were explained. 3. Giving the notice to a boy in the defendant's front yard, and requesting him to hand it to the defendant, was not a personal service." These instructions were all refused; and the court instructed the jury that if the notice of protest was left at the defendant's house, that was equivalent to a personal service, and that it made no difference that the defendant did not receive the notice, or that he never heard of it, or that he never had any knowledge that it had been so left, or whether he ever heard of the protest of the said note.

Verdict and judgment for the plaintiff.

*By the Court*, DIXON, C. J. — The motion for a nonsuit was properly denied. At that time the plaintiff had made out a sufficient *prima facie* case to charge the defendant as indorser. Nor was there any error in the previous proceedings. The certificate of the notary showing presentment and protest for non-payment, and service of notice upon the defendant, together with the time and mode of giving it, was received without objection. There was no impropriety in the question put to the notary as to whether he gave notice to the defendant of the protest of the note. It was obviously asked for the purpose of laying the foundation for the introduction of his official record of protests and notices, which was immediately produced. But if it had been put for any other purpose, we cannot perceive why it should have been rejected on the grounds urged, or what other good objection there was to it. The notary's certificate is not the only evidence by which the service of notice of the dishonor of a note can be established. It may be shown by other evidence, and the notary himself may be called to prove it. The certificate and record are but presumptive evidence by statute (R. S., chap. 12, §§ 4–6), and, being so, are liable to be rebutted or disproved by the testimony of witnesses. And if by other witnesses, then why not by the notary? It is hardly to be supposed that a plaintiff who has made a good case by the record, would, at the risk of shaking or destroying it, seek to go further into the facts by an oral examination of the notary; but if, not being content with the record, he should desire to strengthen it by the oral testimony, we can see no objection to it. Of the several modes of establishing notice, all are open to him, and he may resort to one or more at his option. The only possible ground of objection there can be is, that having made a sufficient *prima facie* case, further proof is unnecessary. If in thus

On the trial the plaintiff gave in evidence the note, with the certificate of protest annexed. This certificate, after stating that the note was presented at the Bank of Oshkosh on the 12th of December, 1859, which was the day it became due, and that payment was refused, contained the following: "And I, the said notary, do hereby certify that on the same day and year above mentioned, notices of the foregoing protest were put into the postoffice at Oshkosh as follows: Notice for James Freeman, Oshkosh, Wis.; notice for W. Wright (left at his house), Oshkosh, Wis. Each of the above named places being the reputed place of residence," etc. The plaintiff then called as a witness the notary by whom the protest was made, and asked him the following question: "Did you give notice to the defendant of protest of the note?" The defendant objected to the question because the certificate and record of the notary, required by statute, were the best evidence, and because the certificate could not be explained or contradicted by parol evidence. The objection was overruled, and the witness answered, "that he had no particular recollection of this notice," and produced his official record of protests and notices. The plaintiff offered this record in evidence; the defendant objected to it on the ground that there was no proof that the notice of which said record purported to contain a copy was ever served on the defendant personally or otherwise; but the objection was overruled, and the record given in evidence. It contained a copy of the note, and of the certificate of protest, etc., previously read in evidence, and also a copy of a notice of protest for non-payment of the note, addressed to the defendant. It was admitted that the defendant resided, at the time of the protest of said note, within two miles of the residence and place of business of said notary; and the plaintiff rested. The defendant moved for a nonsuit, upon the ground that there was no proof of the personal service of the notice of protest upon him; but the motion was denied. The defendant, as a witness in his own behalf, testified that no notice of said protest had been personally served upon him; that none had been left at his house to his knowledge; and that he had made inquiries upon the subject of all the members of his family. The plaintiff then recalled the notary, who testified that he was acquainted with the defendant's place of residence. *Question.* "Have you left notices of protest at his house?" *Objected to, and objection overruled.* *Answer.* "I have, several times." *Question.* "State whether in all cases in which you have made a record of the manner of service upon the defendant, of the notice of protest and non-payment of notes, you have made the same in the manner indicated by the record of protest." *Objected to, and objection overruled.* *Answer* "When I considered it personal service, I entered it so in my record, and did not enter the facts and circumstances which constituted the service. \* \* \* In one instance only — I cannot tell whether this is the one — I met a boy in the defendant's front yard; he said he was the defendant's boy;

must be actually delivered to the person of the indorser where he resides within two miles of the residence of the notary, it has been already answered by this court, in the case of *Westfall v. Farwell*, 13 Wis. 504. It was there held that the words "personally serve" were designed to include service by leaving the notice at the indorser's residence or place of business, as well as by actual delivery to him, and that they were used in contradistinction to service by mail. As to the certificate being uncertain in not showing whether the notice was sent through the postoffice or left at the defendant's house, we think that the words "left at his house, Oshkosh, Wis.," placed immediately after his name, indicate that the latter was the mode of service adopted as to him. The omission to say "*dwelling* house" did not vitiate the certificate. Notaries are only to be held to reasonable certainty in the use of language, and when they say that notice was left at the house of the indorser, all men would understand it to signify his dwelling house. Neither is the certificate defective in not stating the hour of the day when the notice was left, or with whom it was deposited, whether a member of the family or other person, or the particular circumstances attending the service, or that the defendant was absent. It is very generally said in the books, and the doctrine is laid down without any apparent limit or qualification, that the service by leaving the notice at the dwelling house or place of business, is equivalent to a personal delivery to the party to be notified. Judge Story says: "If it be not personally given, then it will be sufficient if it is given or left at or sent to his domicil or place of business." Story on Promissory Notes, § 312. Mr. Chitty says: "With respect to the mode of giving the notice, personal service is not necessary, nor is it requisite to leave a written notice at the residence of the party, but it is sufficient to send or to convey verbal notice at the counting house or place of abode of the party, without leaving notice in writing; and the giving such verbal notice to a servant at his home, the defendant having left no clerk at his counting house, as it was his duty to do, suffices." Chitty on Bills, 502. This is the language of the books generally, and no case has fallen under our observation where it has been held that the absence of the party to be notified was a condition necessary to sustain service by leaving the notice at his place of abode or business; though it is said in *Ireland v. Kip*, 11 John. 231, that the notice must be personal, or something tantamount, such as leaving it at the dwelling house or place of business of the party, *if absent*. See authorities cited by Judge Story, *supra*. Nor does any case seem to have arisen requiring an accurate definition of the manner in which service by leaving notice at the domicil or place of business, when found open and occupied, shall be performed. Where the particular mode of service did not appear, I suppose the cases have gone off on the reasonable assumption that an officer engaged in a duty of that kind would perform it with proper care and prudence, and use the means most likely to attain

the object in view — that he would go to the place of service and inquire for the party to be notified, and, if present, deliver it to him in person, or, if that should be unsuitable or inconvenient, that he would hand it to a servant or some inmate of the place with a request that it be so delivered; and, if absent, that he would in like manner leave it with some person residing or doing business therein, with a similar request. Service at the place of business must be during business hours, but service at the residence is not so regulated.<sup>9</sup> It will be sufficient if made during any of the hours when members of households are attending to their ordinary affairs. But these particulars of service need not be stated in the certificate. It will be sufficient if it shows • service at the residence or place of business, which constitutes legal diligence, and the special circumstances will be presumed until the contrary is shown.

We are not called upon to express any opinion as to the admissibility of the testimony of the defendant. He was permitted to testify without objection, that no notice in fact came to his possession or knowledge. It seems to be well settled law that it is no answer to service properly made at the dwelling house or place of business, that the party to be notified did not in fact receive it.

After the defendant had given his testimony, the notary was recalled by the plaintiff, and testified, among other things, that he had protested several notes against the defendant, and that on one occasion, but whether on that of giving the notice in question he could not say, he met a boy in the defendant's front yard, who said he was the defendant's boy, and gave him the notice and asked him to hand it to his father; that the boy turned and went toward the house, but that he did not see him go in, as the door was not in sight from where he stood. The defendant thereupon requested the court to instruct the jury that giving the notice to the boy and requesting him to hand it to the defendant, was not personal service. Understanding the term "personal service" according to the definition given in *Westfall v. Farwell*, we are of opinion that the defendant was entitled to the instruction. The testimony of the notary clearly tended to impeach his certificate, and, within the principles above stated, it was the legal right of the defendant to have it submitted to the jury to determine whether the notice was given as stated in the certificate or in the oral testimony, or, in other words, whether the occasion of which the notary spoke was that of giving the notice under consideration. If it was, the certificate must fall. Being the statement of a matter which the notary did not know, and false in fact, it could no longer be relied upon as evidence showing due service of notice. And as to the de-

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<sup>9</sup> But if the notice is in fact personal, it seems that it need not be during business hours, although delivered at a place of business. *Bonner v. New Orleans*, 2 Woods (U. S. C. C.) 135; 3 Fed Cas. 853. — H.



livery to the boy being good service, it is not seriously contended that it was; and, if it were, no authority can be found sustaining such a position. Nothing short of service upon the person, or at the dwelling house or place of business, when those places were open and accessible, has ever yet been held a sufficient service, unless it was furthermore shown that the notice came to the actual knowledge or possession of the party; and it is not for us to make innovations upon a doctrine the usefulness of which depends so much upon its certainty and uniformity. For the strict rules which have been held upon this subject, see authorities referred to above, and particularly *Granite Bank v. Ayers*, 16 Pick. 392. If in such a case as this it should be otherwise shown that the indorser actually received the notice, it would present a different question. The plaintiff's case would not then stand on the ground of the official act of the notary.

The instruction should have been given to the jury, and because it was not the judgment is reversed and a new trial awarded.

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(b) *Where parties reside in different places.*

§ 173

LINDENBERGER *v.* BEALL.

6 WHEATON (U. S.) 104. — 1821.

ACTION against indorser. Evidence that on the last day of grace the notice to the indorser was put into the postoffice properly addressed, etc. The court held the proof of notice insufficient. Plaintiff brings error.

The court were unanimously of opinion, that after the demand of the maker on the third day of grace, notice to the indorser on the same day was sufficient, by the general law merchant;<sup>10</sup> and that evidence of the letter containing notice having been put into the postoffice, directed to the defendant, at his place of residence, was sufficient proof of the notice to be left to the jury, and that it was unnecessary to give notice to the defendant to produce the letter before such evidence could be admitted.

Judgment reversed.

§ 175

WHITWELL *v.* JOHNSON.

17 MASSACHUSETTS, 449 — 1821.

ACTION on promissory note payable to the order of defendant, indorsed by him to one Gerrish, and by Gerrish to the plaintiffs. The note was lodged by the plaintiffs in the Massachusetts Bank for collec-

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<sup>10</sup> Accord: *Ex parte Moline*, 19 Ves. 216; 2 Daniel on Neg. Inst., § 1036. — H.

tion. On the 14th of February, 1820, the day when the note became due, after making demand on the maker for payment,\* the messenger of the bank carried two notifications for the indorsers (directed to them, but without any directions, to Newburyport, the town in which they lived), to the store of the plaintiffs; and there was evidence tending to show that these notifications, after being directed to Newburyport, were put into the Boston postoffice the same afternoon. That directed to the defendant was produced, and the postmark upon it was the 15th of February. The post officer at Newburyport testified that it did not arrive at his office until the morning of the 16th; and an officer of the Boston postoffice testified that if the note had been put into the office on the 14th, before eight o'clock in the evening, it would have been stamped the 14th, and if received after that hour, it would have been stamped the 15th, and would have gone into the morning's mail of that day, which arrives at Newburyport about noon.

The jury were instructed that, if they were satisfied from a comparison of the evidence, that the notice to the defendant as indorser was put into the postoffice on the 14th of February, before eight o'clock in the evening, the defendant was liable. A verdict was returned for the plaintiffs, and the defendant moved for a new trial, on account of the directions to the jury.

PARKER, C. J. \* \* \* Supposing, then, the demand [for payment on the maker] to have been sufficient to charge the indorser, the question remaining is, whether seasonable notice was given to him of nonpayment. The note became due on the 14th, and, according to the finding of the jury, the point is settled against the defendant.

But, on the supposition that it was necessary that the notice should have been put into the postoffice on the day when the note became due, a petition has been presented for new trial, on the ground that evidence since the trial has been discovered which has a bearing on that point.

As the evidence at the trial was by no means of a conclusive nature, it would be proper to have a further inquiry if the point to be established was essential to the decision of the cause. After some doubts, and looking into the authorities, we are satisfied that it was not necessary for the plaintiff to show that notice to the indorser was put into the mail on the same day the note became due. What is seasonable notice is a question of law, upon the facts proved. It cannot be requisite, and we do not find that it has ever been required, to give notice to an indorser, living in another town, by the very next mail after the dishonor of the note, or on the same day. This would be an unreasonable hardship on holders of notes, especially as the maker may, before the day expires, take the note up. It is not to be expected

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\* The part of the case relating to the demand on the maker for payment is omitted. — C.

that merchants will leave everything else to attend to this one subject on the very day the note is dishonored. The next day is early enough, and if there should be two mails a day, whether the notice goes by the first or the second of those mails, we think is immaterial, provided it was put into the postoffice early enough to go by a mail of that day.

We understand, from good authority, that the Supreme Court of the United States have adopted the same rule, and it is desirable that the same law should prevail on commercial subjects in all states.

Judgment on the verdict.<sup>11</sup>

## § 175

### SMITH v. POILLON.

87 NEW YORK, 590. — 1882.

ACTION against indorser. The holder notified the third indorser by mail and inclosed notices for the second and first indorsers. The third indorser notified the second indorser and inclosed notice for the first. The second indorser received notice on the 6th and mailed notice to the first indorsers on the 7th, in time for the second mail of the day closing at 1:30 P. M. The first mail of the day closed at 9:30 A. M. The first indorsers (defendants) contend that they were not notified with due diligence. Judgment for plaintiff.

EARL, J. — [After deciding that the presentment and prior notices were sufficient.]

Smith was an aged man, upward of eighty years old. On the morning of March 7 he took the notices for the defendants and drove to Thomaston, for the purpose of consulting his counsel, and there, under the advice of his counsel, he wrote a letter addressed to the defendants, and inclosed it with the notice for the defendants in an envelope addressed to them, and caused it to be mailed at Thomaston, in time for the mail which left there for New York, the residence of the defendants, at 1:40 P. M. That mail passed through Warren, on its way to New York, at 2 P. M. There were two mails each day from Warren, one

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<sup>11</sup> USE OF POST. — Prior to the statute it was held that where there are successive indorsers and the holder sends notice to the last indorser by mail inclosing therewith notices to prior indorsers, the last indorser may use the post-office as a place of deposit for the notices to the prior indorsers who live in the same town as he. (But see *Sheldon v. Benham*, 4 Hill, 129, ante, p. 543.) Under this rule, it is held that such redeposit must be in time to reach the prior indorser in the usual course on the day following the day of receipt. Thus, if the last indorser receives the notices on the 10th, they must be redeposited in season to reach the prior indorsers in the usual course on the 11th. If deposited on the 11th too late to reach the prior indorsers on that day, the indorsers are discharged. *Shelburne Falls Nat. Bk. v. Townsley*, 102 Mass. 177; s. c. 107 Mass. 444. It is this rule, established for the exceptional case where drop letters were permitted independent of statute, that is now extended to the use of drop letters generally under the statute. — H.

closing at about 9:30 A. M. and the other at about 1:30 P. M., and that letter went in the same mail that closed at Warren at 1:30. The contention on the part of the defendants is, that the law required that that notice should have been mailed by the first convenient, practical mail on the 7th, and hence that it should have been mailed by the first mail on that day; and, to sustain their contention, our attention is called to various authorities. (*Smedes v. Utica Bank*, 20 Johns. 372; *Mead v. Engs*, 5 Cow. 303; *Sewall v. Russell*, 3 Wend. 276; *Howard v. Ives*, 1 Hill, 263; *Haskell v. Boardman*, 8 Allen, 38; *Sussex Bank v. Baldwin*, 2 Harrison (N. J.), 487; *Burgess v. Vreeland*, 24 N. J. L. 71; *Lawson v. Farmers' Bk.*, 1 Ohio St. 206; *Freemans' Bank v. Perkins*, 18 Me. 292.) These authorities, while not entirely harmonious, undoubtedly tend to sustain the rule that the notice must be sent on the next day by the first practical and convenient post.'

The counsel for the plaintiff, however, contends that the rule is, that notice of dishonor in such cases may be sent to the prior party by any post of the next day, and he calls our attention to several authorities which tend to sustain his contention. (*Chick v. Pillsbury*, 24 Me. 458; *Whitwell v. Johnson*, 17 Mass. 449; 2 Daniels on Neg. Inst. 87; Story on Bills, § 288; Story on Prom. Notes, § 324; 3 Kent's Com. 106.)

From a careful examination of all these authorities and many others it is clear that the law is not precisely settled. It appears that at first it was supposed to be necessary that notice of dishonor should be given by the next post after dishonor, on the same day, if there was one. That rule was found inconveniently stringent, and then it was held that when the parties lived in different places, between which there was a mail, the notice could be posted the next day after the dishonor or notice of dishonor. Some of the authorities hold that the party required to give the notice may have the whole of the next day. Some of them hold that when there are several mails on the next day, it is sufficient to send the notice by any post of that day. Other authorities lay down the rule, in general terms, that the notice must be posted by the first practical and convenient mail of the next day; and that rule seems to be supported by the most authority in this state. What is a convenient and practical mail depends upon circumstances. It may be controlled by the usages of business and the customs of the people at the place of mailing, and the condition, situation and business engagements of the person required to give the notice. The rule should have a reasonable application in every case, and whether sufficient diligence has been used to mail the notice, the facts being undisputed, is a question of law.

In *Mead v. Engs* (5 Cow. 303), notices of dishonor of a bill reached the post-office at the residence of the last indorser at 5 P. M., and actually came to his hands the next morning. The first mail

thereafter for the residence of the prior party left at 1 P. M., but the notices for that party were not mailed until after that hour. Sutherland, J., said: "The cashier was not bound in the exercise of due diligence to have prepared and forwarded notices by the one o'clock mail; it is not reasonable to demand from him the neglect of his other official duties to prepare his letters and notices during the usual banking hours;" and further, that "the law does not require the holder of a bill or note to give the earliest possible notice of its dishonor; it requires of him only an ordinary and reasonable diligence; nor is he bound, the moment he receives notice of the dishonor of a bill, to lay aside all other business and dispatch notice to the prior parties to the bill; if reasonable diligence is used it is sufficient. In *Darbishire v. Parker* (6 East, 3), Lord Ellenborough observes: "There must be some reasonable time allowed for giving notice, and that, too, accommodating itself to other business and affairs of life; otherwise it is saying that a man who has bill transactions passing through his hands must be nailed to the post-office, and can attend to no other business, however urgent, till this is dispatched."

It does not appear here how far Mr. Smith lived from the post-office at Warren; he was an aged man and wanted some advice about the matter. Early on the day after he received the notices he went to Thomaston to see his counsel, and thus he missed the mail, which closed at 9:30. We think it cannot be said that the delay was unreasonable, or that there was the absence of that proper diligence which the law requires. There was, therefore, no error in holding as matter of law that due diligence was used by Smith in posting the notice to the defendants.

The judgment should be affirmed, with costs.

All concur. Judgment affirmed.<sup>1</sup>

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<sup>1</sup> A mail which closes at 9:10 A. M., being the only mail of the day after the day of dishonor, is not at an unreasonable or inconvenient hour. *Lawson v. Farmers' Bank*, 1 Oh. St. 206 (1853). Six A. M. is an inconvenient hour. *Chick v. Pillsbury*, 24 Me. 458 (1844). "The next day is early enough; and if there should be two mails a day, whether the notice goes by the first or the second of those mails, we think is immaterial, provided it was put into the postoffice early enough to go by a mail of that day." — *Whitwell v. Johnson*, 17 Mass. 449 (1821). The second day after dishonor is too late unless the mail of the first day after closes before business hours. *Bank v. Bradley*, 117 N.C. 526. If the day after dishonor is a holiday or Sunday, it is excluded from the computation. See Neg. Inst. L., § 5 [General Provisions]. It has been held that a notice given on Sunday is ineffective. *Rheem v. Carlisle Deposit Bank*, 76 Pa. St. 132. But not one given on a holiday. *Deblieux v. Bullard*, 1 Rob. (La.) 66. — H.

[See also *Lewis, Hubbard & Co. v. Montgomery Supply Co.*, 59 W. Va. 75, reported in 4 L. N. S. 132, with case note entitled "Bills and notes; time allowed for mailing check or notice of dishonor, as affected by the hour at which the mail closes and departs."

In *First Nat. Bank v. Miller*, 139 Wis. 126, 128, Marshall, J., said: "The law relating to proceedings to fix the liability of an indorser of a promissory

## § 175

STAINBACK *v.* BANK OF VIRGINIA.

11 GRATTAN (VA.) 260. — 1854.

ACTION against indorser of bill drawn on a drawee in London and protested for non-acceptance on April 5th.<sup>2</sup> Notice was sent in a mail leaving Liverpool on April 19th by a Cunard steamship, that being the first steamship leaving England for the United States after the dishonor of the bill. But between the 5th and the 19th several sailing packets carrying mails left England for the United States. It was the usage of the London post-office to forward all mail by the Cunard line unless specially directed to be forwarded by other vessels. Judgment for plaintiff.

SAMUELS, J. \* \* \* The law requires notice of dishonor of commercial paper to be transmitted to the parties thereto for the purpose of enabling them to do what is needful to protect their interests; to this end it may be important to have early notice, and the law requires it to be given. In the case before us the notice was sent in a mode which would bring it to the hands of the plaintiff in error at the earliest practicable day. Yet it is alleged that it should have been sent by another mode, which, although it might have commenced the transmission at an earlier day, yet would not have delivered it so soon as the mode adopted. If we could yield to the arguments of the plaintiff's counsel, we should sacrifice the object of the law. The notice was transmitted in the mail by an ocean steamer belonging to the Cunard line, which line carried the mail from Great Britain to the United States. It was sent by the first steamer which started after the bill was dishonored. This brings the case within the stringent rule of requiring that the notice be sent by the first mail. It appears, however, that there are regular lines of sailing packets from London (the place of the drawee's residence)

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note, in case of dishonor by the maker, was different in some states than in others, and for harmony on that as to the time and manner of giving notice of dishonor to the indorser it was provided by subdivision 34, § 1678, (N. Y., § 175), of the Negotiable Instrument Statute, that, 'where the person giving and the person to receive notice reside in different places, the notice must be given \* \* \* if sent by mail' by depositing it 'in the postoffice in time to go by mail the day following the day of dishonor, or, if there be no mail at a convenient hour on that day, by the next mail thereafter.' Here notice was not sent till after time for mail on the first secular day after dishonor, though there was ample opportunity to do so. The departure time for the mail was between 9 and 10 o'clock of such day. That was certainly a convenient time within the meaning of the statute. No excuse is found in the evidence for not depositing the notice with postage fully paid so as to have reached the respondent by such mail. The deposit on the evening of that day, after ordinary business hours and long after the closing of the mail for such day, as regards the route by which it must have been known the notice would reach respondent, if at all, clearly was too late." — C.

<sup>2</sup> See Neg. Inst. L., § 260. — H.

to the United States; that these packets carried letter bags made up at the London post-office; and that the times for their sailing from Great Britain occurred between the day of the dishonor of this bill and the day of the steamer's leaving. It further appears, that although a sailing packet should leave on the regular day for her departure, and thereafter a steamer should leave on her regular day of departure, the steamer would probably arrive first in the United States. It further appears, that the line of mail steamers is used by a very large majority of business men for the transmission of letters from Great Britain to the United States. There can be no question, that of these two modes of transmission, the proper one was adopted. This one has in its favor the facts that it carries the mail, that it is the ordinary mode of transmission, and that it may be expected to deliver a letter at an earlier day than the other; that other having in its favor the facts that it starts at an earlier day, and carries a letter bag. There is nothing to counterbalance the fact that the other line will deliver the letter at the earliest day. I think the notice of dishonor was duly transmitted.

I am of opinion to affirm the judgment. The other judges concurred.

Judgment affirmed.<sup>3</sup>

§ 175

JARVIS v. ST. CROIX MFG. CO.

23 MAINE, 287. — 1843.

ASSUMPSIT against the defendants as drawers of a bill of exchange, dated Aug. 10, 1839, on N. Dewey of the city of New York, payable in 60 days after sight, accepted by Dewey on Aug. 26, 1839, and indorsed by the defendants, and by the plaintiffs.

The plaintiffs resided at St. John, New Brunswick; the place of business of the defendants was at Calais in this state; and the acceptor resided in the city of New York.

The bill was protested in the city of New York, for non-payment by the acceptor, on Oct. 28, 1839, and a notice, addressed to the defendants, informing them of the dishonor and protest, was, at the request of the plaintiffs, placed in the post-office at Eastport on the eleventh day of November, 1839. It was agreed, that the mail was at that time five days in passing from New York to Eastport; that the mail between St. Andrews and St. John passed three times each week, leaving the former place on Monday, Wednesday, and Friday, and returning on Tuesday, Thursday, and Saturday, leaving each

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<sup>3</sup> Notice must be sent by the first usual mail ship whether it sail direct to the port of the drawer or indorser or to some other port of the United States. *Fleming v. McClure*, 1 Brevard (S. Car.) 428 (1804); *Lenox v. Leverett*, 10 Mass. 1 (1813). — H.

place early in the morning and arriving late in the evening; that the mail between Eastport and Calais then passed on alternate days, and on said eleventh day of November passed from Eastport to Calais, leaving before the notice was put into the office; that letters to and from the Province of New Brunswick meet through that mail; and that letters from St. John for Calais would not go by the way of Eastport, but directly from St. Andrews to Robbinston and from thence to Calais. The court, upon this evidence, were authorized to draw any inferences which a jury would be authorized to do, and to order a nonsuit or default, as justice might require.

The opinion of the court was by

WHITMAN, C. J. — Notice of the non-payment of the draft in this case could not have reached the defendants before the 16th or 17th day after its dishonor. Instead of sending it directly from St. John to Calais, by due course of mail, the plaintiffs seem to have preferred sending it to Eastport; and there to have mailed it for the defendants at Calais. This was on the 16th day after its dishonor in New York. The mail was five days in reaching Eastport from New York. This accounts for five days of the time. How it should happen that eleven days more were necessary to forward it from thence to St. John and back to Eastport does not appear. It does not seem, by the course of the mails between Eastport and St. John, that more than four or five days need be occupied in the transmission of a letter and the return of an answer. It is true that the plaintiffs had a right to adopt a private conveyance for the receipt and transmission of notice. But it is clearly incumbent on them to show that due diligence was used. The evidence in the case is entirely silent as to how it should have happened that so much greater delay took place than we can see, from the evidence, to have been necessary. It was incumbent on the plaintiffs to have removed any reasonable doubts upon this point; and, not having done so, we think a nonsuit must be entered.

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(c) *Successive notices.*

§ 178

LINN v. HORTON.

· 17 WISCONSIN, 151. — 1863.

ACTION against irregular indorser<sup>4</sup> by payee. The note was payable in Janesville, Wis. Plaintiffs were merchants in New York. Plaintiffs indorsed for collection to K., in New York. K. indorsed for collection to Central Bank in Janesville. The latter, on dishonor on Nov. 22, mailed notices to K., who received them on

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<sup>4</sup> See Neg. Inst. L., § 114. — H.



Nov. 27, and delivered them to plaintiffs on that day. On the same day plaintiffs mailed notice to defendant at Janesville, but it was never received by him. Judgment for defendant.

*By the Court, DIXON, C. J.* — It is an established principle of mercantile law, that if the holder of a bill or note chooses to rely upon the responsibility of his immediate indorser, there is no necessity for his giving notice to any previous party; and if such notice be properly given, in due time, by the other parties, it will inure to the benefit of the holder, and he may recover thereon against any of them. Thus, if the holder notifies the sixth indorser, and he the fifth, and so on to the first, the latter will be liable to all the parties. (1 Parsons on Bills and Notes, 503, 504; and Edwards on Bills and Notes, 473, 474, and the cases cited.) And it is no objection to such notice that it is not in fact received so soon by the first or any prior indorser, as if it had been transmitted directly by the holder or notary, provided it has been seasonably sent by each indorser as he receives it. (*Colt v. Noble*, 5 Mass. 167; *Mead v. Engs*, 5 Cow. 303; *Howard v. Ives*, 1 Hill, 263.) And the same degree of diligence must be exercised on the part of the indorser in forwarding notice as is required of the holder. Ordinary diligence must be used in both cases. He is not bound to forward notice on the very day upon which he receives it, but may wait until the next. (*Howard v. Ives*, and the authorities cited.)

For the purpose of receiving and transmitting notices, those who hold at the time of protest, and those who indorse as mere agents to collect, are regarded as real parties to the bill or note; the former as holders in fact, and the latter as actual indorsers for value. (*Mead v. Engs*; *Howard v. Ives*, *supra*.) <sup>5</sup>

It follows from these principles, that the proper steps were taken to charge the defendant Horton as indorser. Notice for him was forwarded by mail, postpaid, on the day of the protest, to the agents and last indorsers in New York, and delivered by them, on the day it was received, to the plaintiffs, their immediate indorsers, who, on the same day, deposited it, inclosed in an envelope, postpaid, in the post-office at New York, directed to the defendant at Janesville, Wisconsin, his proper post-office.

Under these circumstances, the only question which can possibly arise is, whether the defendant ought to be discharged by reason of the notice not having been in fact received by him. He testifies that it was not. Professor Parsons observes, that in all the cases of constructive notices, where notice given by a subsequent to a prior indorser has been held to inure to the benefit of the immediate indorser, it has appeared that the notice was actually received; and

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<sup>5</sup> See also *Farmers' Bank v. Vail*, 21 N. Y. 485; *Rosson v. Carroll*, 90 Tenn. 90. — H.

he raises a question whether this would be so if the notice was sent to the wrong place. (1 Parsons on Bills and Notes, 504, note, and 627.)<sup>6</sup> But here the notice was sent to the right place. Besides, the plaintiffs, who seek to avail themselves of the notice, are the indorsers who sent it to the defendant as the indorser next immediately preceding them. We have already seen that the rule of diligence as to them is the same as in the case of the holder.

Let the judgment be reversed, and the cause remanded with directions to enter judgment in favor of the plaintiffs according to the demand of the complaint.<sup>7</sup>

## § 178

SIMPSON *v.* TURNEY.

5 HUMPHREY (TENN.) 419. — 1844.

REESE, J., delivered the opinion of the court.

The Branch Bank of the State of Tennessee was the holder of a promissory note, payable at said bank, made by James H. Jenkins, to Anthony Dibrell, and endorsed in the following order: A. Dibrell, S. Turney, and Jno. W. Simpson. Turney's residence is within one mile of the bank, at Sparta, so known to be to the bank, and to all the other parties to the note. The note was legally due on the 1st day of February, 1843, that being the third day of grace. It was on that day protested. On the second day of February no notice of the protest for the non-payment of the note was either served on Turney personally or left at his residence. He had notice from the bank, the holder, on the 3d day of February. John W. Simpson, the plaintiff, the immediate indorsee of Turney, gave him no notice whatever.

These facts being specially found by the jury in the case, the Circuit Court gave judgment for Turney, and the plaintiff has appealed in error to this court.

It is not insisted for the plaintiff here that the notice of the bank to Turney, the only notice he received, was in time. But it is

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<sup>6</sup> See *Beale v. Parrish*, 20 N. Y. 407. — H.

<sup>7</sup> In *Jurgens v. Wichmann*, 124 App. Div. (N. Y.) 531, 532, Gaynor, J., said: "The point is also made that notice of dishonor was not given to the appellant in time. The evidence is that the plaintiff endorsed and deposited the check in his bank for collection on July 28th, and that he notified appellant by telegraph on July 30th of its dishonor. The evidence is that this was done immediately after the plaintiff had received notice of such dishonor from his bank. By sections 174 and 175 of the Negotiable Instruments Law, the plaintiff's bank had until the day following the dishonor to give him notice, which would be July 29th, and by section 178 the plaintiff had until the day following notice to him to give the appellant notice."

See also *Oakley v. Carr*, 66 Neb. 751. — C.

urged, that if Simpson had given him notice on the day he received notice from the bank, such notice would have been good; and that is certainly so; and the plaintiff further insists that the notice given by the bank shall inure to his benefit. If the notice had been in time and valid, it would by law have inured to his benefit, he being an intermediate party. But a notice of no benefit to the bank, because not fixing the liability of the party notified, cannot inure to the benefit of another. So to hold would be to introduce a new principle into the law merchant. Suppose there were ten indorsers upon a note; if the holder, ten days after the protest, gave notice to the first indorser, this, according to the argument, would fix all the indorsers, for it would be just the time necessary to them to have given notice to each other successively.

It is perhaps a universal principle, where substitution exists at all, that the matter or thing to be substituted to must be valid and effective in behalf of the principal; if it be ineffectual in his behalf, it is difficult to see how it can inure to the benefit of others.

Upon the direct question raised in this case, Bayley on Bills expressly says: "Nor is it any excuse that there are several intervening parties between him who gives the notice and the defendant to whom it is given; and if the notice had been communicated through those intervening parties, and each had taken the time the law allows, the defendant would not have had the notice the sooner." The same principle is also decided in the case of *Turner v. Leech* (4 Barnwall & Alderson, 454).

We have been referred by the plaintiff, to what has been said by this court in the case of *McNeil v. Wyatt* (3 Humphreys, 128). The bank at Lagrange in that case gave notice to one Glover on the 14th to be served on Wyatt & McNeil. Wyatt was served on the 14th, and McNeil on the 15th. But Glover proved in the Circuit Court that he was the general agent of Wyatt to serve notices for him when his name was on paper. And the Circuit Court left it to the jury to say whether Glover, who served the notice, was not Wyatt's agent as well as the agent of the bank; and if he was, then the notice to McNeil on the 15th, one day after Wyatt received notice, was sufficient.

This court held that there was not any error in this part of the charge; and placing the validity of the notice, as this court did, upon that special ground, is a distinct recognition of the general principle maintained by us in this case.

Upon the whole, we affirm the judgment.<sup>s</sup>

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<sup>s</sup> Accord: *Rowe v. Tipper*, 13 C. B. 249. — H.

§ 178 FIRST NATIONAL BANK *v.* FARNEMAN.

93 IOWA, 161. — 1894.

ACTION against indorser. Defendant indorsed to plaintiff. Plaintiff indorsed for collection to Valley Bank. The latter indorsed for collection to German Bank, at Carroll, which place, unknown to German Bank, was the residence of defendant. The German Bank, on dishonor on Nov. 10, mailed notices to Valley Bank, which forwarded them to plaintiff, who received them on Nov. 12, and on that day gave personal notice to defendant. Of the indorsements on the bill all except that by the defendant are erased. Judgment for defendant.

GRANGER, C. J. \* \* \* Appellant relies, mainly, in argument on a rule that the holder need only notify his immediate indorser, and this indorser the next, and so on, and then claims that the German Bank did notify the Valley Bank. How such a rule might affect the rights of parties were the German Bank seeking to recover, it is not for us to say. Defendant is the immediate indorser of the plaintiff bank, and, because of the erasures, there are no other indorsers; and the rule cited, if a correct one, is without force. It is to be kept in mind that, as to the indorsers other than the defendant, they were such for collection only, and the indorsements were erased. We treat the case on the theory of but a single indorser, and that one the defendant.

The judgment is affirmed.

## 6. PLACE AT WHICH NOTICE MUST BE GIVEN.

§ 179 MORRIS *v.* HUSSON, 4 Sandford (N. Y. City Superior C'trt.), 93. — 1850. MASON, J. — “The addition by the defendant of the words, ‘13 Chambers Street,’ beneath his indorsement, could have no other meaning than a direction as to the place where notice should be sent in case of the dishonor of the note, and the notice put in the post-office addressed to him, as was the notice in this case, to No. 13 Chambers street, was given strictly in compliance with his directions.”

§ 179 BARTLETT *v.* ROBINSON, 39 New York, 187. — 1868. WOODRUFF, J. — “As well when the parties do not reside in the same city or town as when (according to our statute) they do, or in short whenever notice is sent by mail or deposited in the post-office, the notice must be directed to the indorser, not only at the city or town, but to the specific place designated by the underwriting. \* \* \* I think \* \* \* that the words ‘directed to the indorser at such city

or town' includes as a part of such 'direction' conformity to the prescription which the special indorsement imports." [Hence, a notice addressed to "A. B., city of New York," is not sufficient where the indorsement is "A. B., 214 E. 18th st."].

## § 179

BANK OF GENEVA *v.* HOWLETT.

4 WENDELL (N. Y.) 328. — 1830.

ACTION against indorser. Verdict for defendant.

*By the Court*, SUTHERLAND, J. — The verdict is clearly against the weight of evidence. Charles A. Cook, the cashier and notary of the bank, testified that he regularly protested the note on the day it became due, and sent notice thereof on the same day to the defendant, directed to him at Geddesburgh, and put the notice in the post-office at Geneva. He did not recollect whether he put the county on the notice of protest, but it was his custom to do so.

It was shown, on the part of the defendant, that the legal name of the post-office near which the defendant resided was Geddes, not Geddesburgh; but all the witnesses concurred in stating that it was known as well by the one name as the other, and that at least half the people called it Geddesburgh; and Mr. Earle, the postmaster at Onondaga Hill, within a few miles of Geddes, testified that until lately he supposed the name of the post-office was Geddesburgh, and if a letter was put in his office directed to Geddesburgh, he should forward it to Geddes. He further stated that there was no post-office, either in this state or in the United States, of the name of Geddesburgh. John Wilkinson, the postmaster at Syracuse, testified that packages in the mails were as frequently directed to Geddesburgh as Geddes, except from the large offices. Upon this testimony there can be no question, if the notice was directed to Geddesburgh without the name of the county, that it was sent to Geddes. But the fair intendment from the testimony of the notary is, that the name of the county was also part of the superscription. It was his general custom so to direct his notices, and no circumstance is stated to induce the belief that he departed from it in this instance. The verdict, therefore, under the charge should have been for the plaintiff.

The judge decided, as a question of law, that the notice was good, if it was sent to the Geddes or Geddesburgh post-office. It was properly assumed as a question of law, and the opinion of the judge was correct.

The evidence shows that although the defendant resided a mile and a half or two miles nearer to the post-office at Onondaga Hill than to Geddes, still that Geddes was his place of business, where he carried on the manufacturing of salt and the slaughtering and

packing of beef; that he received letters at both offices. More letters for him individually were received through the office at Onondaga C. H. than at Geddes; but all the company letters were directed to the latter office. The defendant or his sons were in the habit of calling for letters at the Geddes office, and he kept a postage account there.

Under such circumstances, notice directed to either office would be good. It is not indispensable that the notice should be sent to the office nearest to the residence of the party, nor even to the town in which he resides. It is sufficient if it be sent to the office to which he usually resorts for his letters, and where he would probably receive it as soon as at the office nearer to him. (*Reid v. Payne*, 16 Johns. R. 218; 1 Peters, 578; 10 Johns. R. 411; 11 Id. 490.) When a party has a dwelling house and counting room, or other place of business in the same place or town, notice sent to either is sufficient. (*Bank of Columbia v. Lawrence*, 1 Peters, 582, 583); and it cannot be material whether the residence of the party and his place of business be in the same town or not, if it appears that he is in the daily or constant habit of receiving letters at both places. The notice, therefore, was sufficient, and the defendant was legally charged.

It has been decided by this court that deducting interest by way of discount at the rate of seven per cent., upon commercial or business paper, is not usurious. (*Manhattan Company v. Osgood*, 15 Johns. R. 168; *Bank of Utica v. Wager*, 2 Cowen, 766, 767; *Bank of Utica v. Phillips*, 3 Wendell, 408. See, also, *Fleckner v. The Bank of the U. S.*, 8 Wheaton, 838; 4 Yeates' Rep. 220, 223; 9 Mass. R. 49; 3 Bos. & Pul. 154.)

A new trial must be granted, on the ground that the verdict is against evidence.<sup>9</sup>

## § 179

## VOGEL v. STARR.

132 MISSOURI APPEALS, 430. — 1908.

JOHNSON, J. — Action against the indorser of a negotiable promissory note. The failure of the holder to give proper notice of dishonor is the defense interposed. Trial was before the court without the aid of a jury. Judgment was entered for defendant, and plaintiff appealed.

<sup>9</sup> Accord: *Montgomery Co. Bank v. Marsh*, 7 N. Y. 481; *Mercer v. Lancaster*, 5 Pa. St. 160; *Shelburne Bank v. Townsley*, 102 Mass. 177.

Where the indorser lives in a town having two or more postoffices a notice addressed to him at the town generally is sufficient unless the holder knows or might reasonably know his particular postoffice address. *Saco Nat. Bk. v. Sanborn*, 63 Me. 340; *Remer v. Downer*, 23 Wend. (N. Y.) 620; *Morton v. Westcott*, 8 Cush. (Mass.) 425; *Roberts v. Taft*, 120 Mass. 169. — H.

The note in question is as follows: “\$45. Trenton, Mo., Oct. 7, 1895. One year after date, I promise to pay to the order of O. J. Starr, forty-five dollars, for value received with interest at the rate of eight per cent. per annum from date, until paid, and if not paid annually, the same to become a part of the principal and bear the same rate of interest as the principal debt. Payable at the First National Bank, Trenton, Mo. C. Millard.”

A few days after the execution of the note, and long before its maturity, Starr, the payee, sold it to plaintiff for value, and indorsed it in blank. Later plaintiff deposited it with the Trenton National Bank for collection. On the last day of grace, October 10, 1896, and within proper hours, the bank handed the note to a notary public for demand and protest. Millard, the maker, had moved to Wisconsin, and Starr, the indorser, lived in the country about 12 miles from Trenton. The notary testified: <sup>10</sup> “\* \* \* My impression is that in regard to Mr. Starr’s address the bank’s best information; that is, they told me they were not certain about it. That’s the way I remember it: that it was Spickards, Mo. And I took the note. It was payable at the First National Bank, Trenton, Mo., and I took this note to the building that had been occupied by the First National Bank. The First National Bank at that time had gone into liquidation in connection with the old Grundy County National Bank. It had its first banking room at the five corners; and the First National and the old Grundy County National consolidated and liquidated through the Trenton National Bank. \* \* \* This protest shows that I took it to that building and presented it there, and found no one there to pay the note. And, after that, out of an abundance of precaution, I went over to the Citizens’ State Bank, which was diagonally across the street from the building formerly occupied by the First National, and I presented the note there, to the cashier of that bank, as the protest shows, and demanded payment there. I think Walter P. Fulkerson was cashier at that time, and there was nobody there that would pay the note; so from there I went to the Trenton National, or might be probable I made the demand there before I went to the other place, at any rate, I presented the note as the protest shows to the cashier of the Trenton National Bank, Mr. R. M. Cook, and demanded payment of the note. R. M. Cook had already been the cashier of the First National Bank, at which this note was payable, and he was winding up the affairs of the old First National at the time, and also cashier of the Trenton National. Then I made inquiry as to where Mr. Starr lived, and made a diligent search, as I thought. \* \* \* They thought Mr. Starr lived near or got his mail at Spickards, Mo., and so I made some other inquiries as to where

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<sup>10</sup> Certain portions of the notary’s testimony are omitted. — C.

Starr lived, at the banks, Mr. Cook and the Citizens' Bank also, and I wouldn't say positively as to who else I did inquire of \* \* \* I mailed the notice to Starr at Spickards, Mo. \* \* \*

Starr did not receive the notice until some three months after it was mailed, for the reason that Tindall, and not Spickards, was his post-office. The farm he occupied as a tenant was about one mile nearer Spickards than Tindall, either by wagon road or as the crow flies, and Spickards, though a small town, was much larger than Tindall. But Starr had made the latter place his post-office address while living on a farm nearer to it than to Spickards, and continued to get his mail there. No doubt is suggested in the evidence of the good faith of the notary and of plaintiff's collection agent in mailing the notice to Starr's nearest post-office, nor do we find anything indicative of bad faith on the part of plaintiff, the owner of the note. He was not in Trenton on the date of the protest, nor had he imparted to his collection agent the information he possessed respecting Starr's post-office address. Had he done this, we perceive nothing in the facts known to him to support the conclusion that his collection agent and the notary might have acted differently. The farm where plaintiff lived was, perhaps, two miles from that occupied by Starr. While the note was maturing, they met occasionally and casually on the public road, at Tindall, or at a neighborhood church, but plaintiff did not know that Starr received his mail at Tindall, and it appears that he and Starr were acquainted only slightly.

While it is true that the holder of commercial paper for collection must be regarded as a separate and independent holder for the purposes of presentment, demand, protest, and notice of dishonor (*Renshaw v. Triplett*, 23 Mo. 213; *Griffith v. Assmann*, 48 Mo. 66; *Ivory v. Bank*, 36 Mo. 475; *Bank v. Briedow*, 31 Mo. 523; *Young v. Hudson*, 99 Mo. 102), we are willing to concede for argument that it was the duty of plaintiff to communicate to his collection agent the facts in his knowledge relating to the post-office address of the indorser, but we do not sanction the contention that he was charged by law with the further duty either to notify the indorser personally of the dishonor of the note or to make inquiries in the neighborhood to ascertain the place where the indorser received his mail. The note, by its terms, being payable at Trenton, it was very natural that plaintiff should employ an agent at that place to look after its collection, and that he should rely on his agent to take the necessary steps to hold the indorser. We are going far enough when we assume that it was his duty to communicate to his agent the knowledge of facts material to the subject of the employment he had or might acquire during the course of the employment. It was not his duty to perform personally the very duties he had delegated to his agent. When a person employs an agent to do a thing, he should not be held to be remiss for relying on his agent and only may be



held liable for the negligent or wrongful acts of the agent in the performance of the delegated duty under the principle that what one does by the hand of another he does himself.

Imputing to the collection agent and the notary knowledge of the facts known to plaintiff, our chief concern is with the question of whether the notary exercised reasonable diligence in the giving of notice to the indorser. Since we find in the record no controversy over material facts, the question is one of law, not of fact. As early as the case of *Linville v. Welch*, 29 Mo. 203, it was decided by the Supreme Court that what is due diligence in giving notice of dishonor of a bill of exchange is a question of law when the facts are undisputed, and, when they are in dispute, the court should give hypothetical instructions, leaving the facts to be determined by the jury. *Sanderson's Adm'r v. Reinstadler*, 31 Mo. 483; *Fugitt v. Nixon*, 44 Mo. 295.

Considering the case, then, from the standpoint presented by the facts known to plaintiff, knowledge of which we ascribe to the notary, and by the facts acquired by the notary from his own inquiries, and treating the question of due diligence as a question of law, we next turn to consider the principles and rules by which the holder of a bill of exchange must be controlled in giving to an indorser notice of dishonor. The liability of the indorser is conditioned upon the existence of two facts, viz: (1) That the maker has made default in the payment of the bill at maturity; (2) that due notice of that fact be given the indorser. As to what will constitute sufficient notice, it is well settled that personal service of the notice is not required. Constructive service will suffice if reasonable diligence be exercised to make it in the manner best adapted to convey actual notice. "Where the party to be served is a resident of the city or town where the protest is made, the course required is to give him personal notice or to leave it at his dwelling or place of business. But if he lives in the country, then a notice by mail to his postoffice will be sufficient." *Barrett v. Evans*, 28 Mo. 331; *Sanderson's Adm'r v. Reinstadler*, *supra*. When the indorser lives in the country and his postoffice address is not known to the holder, it is the duty of the latter to make reasonable inquiries in the town or city where the bill is payable, and, in default of more specific information, to address the notice to the postoffice nearest the residence of the indorser. But the holder is not justified, in all cases, in sending the notice to the nearest postoffice. He must act in good faith always and with reasonable diligence to learn the place where the indorser receives his mail, and, learning it, must send the notice there, regardless of whether it be the nearest postoffice.

With these principles before us, we do not hesitate to declare as a matter of law that the notary, whose good faith is not questioned, exercised reasonable diligence and acted on the information he received in a way which would have commended itself to any reasonably careful

and prudent person in his situation. He made inquiries of several persons, all of whom appeared to possess some information on the subject, and all expressed the belief that Spickards was the proper address of the indorser. Taking these opinions, in connection with the facts that Spickards was the nearest town to the indorser's farm and was a much larger place than Tindall, we think any person in the situation of the notary would have come to the conclusion, as he did, that the notice should be sent there. Finding, as we do, that the notary acted properly, it is immaterial that the indorser failed to receive the notice within a reasonable time. That was his misfortune, for which, in a sense, he was responsible. He was justified in standing strictly on his right to legal notice, but presumably he knew of the fact of the maturing of the note, and from all the circumstances must have anticipated that notice of dishonor likely would be addressed to him at Spickards. The notice was sufficient.

The case was not tried in accordance with the views expressed, and it follows that the judgment must be reversed and the cause remanded. All concur.

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## § 179

BANK OF COMMERCE *v.* CHAMBERS.

14 MISSOURI APPEALS, 152. — 1883.

ACTION against maker and indorser. Indorser sets up a want of notice. The indorser (Frost) had a general residence or domicile in St. Louis and a general place of business in St. Louis, but his family were sojourning at Selma, Mo., a place without a postoffice, while he was sojourning at Washington, as a member of Congress. Notices were mailed to him, addressed to St. Louis, Washington and Selma, respectively. Judgment for plaintiff.

THOMPSON, J. [After deciding that the notices mailed to St. Louis were insufficient because holder and indorser both resided in St. Louis.]

We are of opinion that the general notice sent by mail and addressed "Hon. R. Graham Frost, Washington, D. C.," might properly have been regarded by the trier of facts as a good notice. There is evidence tending to show that, before the notary sent this notice, he went to the postoffice and there inquired for Mr. Frost's address, and was told it was Washington, D. C., whereupon he mailed the notice to him as stated.

This was on the 23d of December, 1880. The Congress was then in regular session, but it had, on the day previous, taken the usual holiday recess, as was shown by a copy of the Congressional Record put in evidence. This recess was taken from the 22d of December until the 5th day of January following. That a notice of protest sent

by mail to a member of Congress while engaged in discharging his public duties as such at Washington, is a good notice, has been held, both in Massachusetts and Mississippi. (*Chouteau v. Webster*, 6 Metc. 1; *Tunstall v. Walker*, 2 Smed. & M. 638.) In the former of these cases, Daniel Webster, a senator from Massachusetts, was, when the notice of protest was sent to him by mail, at Washington, D. C., attending a special session of Congress at Washington, and he had at Boston, just as Mr. Frost had at St. Louis, a place of business and an agent to attend to his business; and yet the court, Chief Justice Shaw delivering the opinion, held that the notice thus mailed to him was a good notice.

The fact that Congress had taken this temporary recess may not have been known to the notary, and, if known, it would not necessarily indicate to him that Mr. Frost would be absent from the capital during such recess. If it should indicate this it would not impair the legal sufficiency of the notice; because the controlling rule is that where the indorser has different residences and different places of business, the notice must be sent to the place, where, upon diligent inquiry, it seems most likely to reach him with certainty and promptness. (*Cabot Bank v. Russell*, 4 Gray, 169, 470, per Shaw, C. J.)

Nor can the circumstance that the indorser was in the habit of receiving his mail, not at the general postoffice in Washington, but at a special postoffice in the capital building, impair the legal sufficiency of this notice, unless this fact were known to the notary or would have been disclosed to him upon reasonable inquiry. That he did not know this appears from the evidence, and that it was not disclosed to him upon the inquiry which he made at the postoffice in St. Louis also sufficiently appears. It seems that this postoffice was the most proper place at which to make such an inquiry, for it must be supposed from the nature of Mr. Frost's public duties at the time that numerous letters were constantly received at the St. Louis postoffice for transmission to him at his official residence at Washington. At all events, it cannot be said that this testimony was not sufficient to take the case to the trier of the fact upon the question of diligence. It has been held several times, that where there are two or more postoffices in the town where the indorser resides, a notice sent by mail to the town generally will be a good notice, unless a reasonable inquiry would have disclosed to the holder or the notary the actual postoffice at which the indorser commonly received his mail. (*Burlingame v. Foster*, 128 Mass. 125; *Morton v. Westcott*, 8 Cush. 425; *Cabot Bank v. Russell*, 4 Gray, 167.)

The "towns" here spoken of are not cities or villages, but New England towns, which correspond to townships in Missouri and Illinois, each of which frequently contains several villages and several postoffices.

[The learned judge then holds that notice addressed to Selma was good, in view of the evidence that mail addressed to Selma was regularly sent to Crystal City, the postoffice nearest Selma. <sup>1</sup>

Judgment affirmed. <sup>2</sup>

### III. When delay in giving notice excused.

§ 184

JAMES *v.* WADE.

21 LOUISIANA ANNUAL, 548. — 1869.

HOWE, J. — The defendant is sued as the indorser of a bill of exchange drawn by W. R. Hughes on Moore and Browder, of New Orleans, and by the latter accepted, payable on the fifteenth February, 1863.

On the day of its maturity the bill was protested by a notary in New Orleans, and a notice deposited in the postoffice in that city addressed to the defendant, at Winnfield, parish of Winn, Louisiana.

The record shows that in February, 1863, all postal and commercial intercourse was suspended between New Orleans and Winnfield. The war was then raging, and the deposit of the notice in the postoffice in New Orleans had no effect in converting the conditional obligation of the indorser into an absolute liability. (19 A. 43, 63, 64, 72, 90; 20 A. 399.)

If the holders of this bill desired to bind the indorser, it was their duty to have given him notice of dishonor within a reasonable time after the close of the war, and the resumption of commercial intercourse. There being no evidence that any notice except the one described above was ever given, the indorser must be held to have been discharged. \* \* \*

Judgment affirmed. <sup>3</sup>

### § 184 UNION NATIONAL BANK *v.* MARR'S ADMINISTRATOR.

6 BUSH (Ky.) 614. — 1869.

ACTION against drawer of a bill drawn in Missouri upon a drawee in New Orleans and presented July 17, 1861, and dishonored. Judgment for defendant.

JUDGE HARDIN delivered the opinion of the court.

<sup>1</sup> See *Bank v. Howlett*, 4 Wend. 328, *ante*. p. 566. — H.

<sup>2</sup> Accord: *Graham v. Sangston*, 1 Md. 59. But if the indorser simply visits a place for a purpose clearly temporary and special, he is not "sojourning" within the rule of the above cases. *Walker v. Stetson*, 14 Oh. St. 89. — H.

<sup>3</sup> Accord: *Norris v. Despard*, 38 Md. 487; *Dunbar v. Tyler*, 44 Miss. 1; *Harden v. Boyce*, 59 Barb. (N. Y.) 425. So, also, delay occasioned by presence of malignant disease. *Tunno v. Lague*, 2 Johns. Cas. (N. Y.) 1. — H.

This was an ordinary action by the appellant, as the holder of a bill of exchange for \$1,262.50, dated at Charleston, Missouri, the 10th day of June, 1861, drawn by P. N. Marr upon Samuel Y. Thomas, New Orleans, Louisiana, payable to the order of Thomas Allen, and indorsed by him and Shelby Sheeks.

It appears that the bill was presented for acceptance in New Orleans on the 17th day of July, 1861, and thereupon protested for non-acceptance, of which notices addressed to the parties were mailed by the notary to the agents of the plaintiff, but it does not appear they were legally forwarded to the defendants, who in their defense denied that due notice of said protest was given, and claimed exoneration on that ground.

The principle is well settled, that, although the holder of a bill of exchange, payable at a given time, is not bound to present it to the drawee for acceptance until it becomes due; yet if he does so, and the bill is dishonored, he is bound to give due notice of the fact to the parties whom he intends to hold bound. (*Landrum v. Trowbridge*, 2 Met. 281; Story on Bills, §§ 227-228-284.) But the appellant questions the correctness of the judgment dismissing the petition, on a trial of the case by the court, mainly on the ground that at the time of said protest the civil war had become flagrant, and so suspended commercial intercourse between the hostile sections of the country as to dispense with the necessity of notice of protest to bind the drawer and indorsers of said bill; and especially so as the bill was not protested till after the passage of the act of Congress of the 13th of July, 1861, authorizing the President to issue his proclamation interdicting commercial intercourse between the citizens of certain belligerent states, although the proclamation was not issued till the 16th of August, 1861, near one month after the bill was protested.

But this case must be ruled by the case of *Leathers v. The Commercial Insurance Co.* (2 Bush, 296), in which, upon a careful consideration of the subject, this court, referring to the proclamation of the 16th of August, 1861, as public notice of the congressional recognition of a state of war, held that "before that time contracts and other acts of commercial intercourse were not made illegal by the war."

Notwithstanding the disturbed condition of the country, which we know judicially to have existed when the bill was protested, it does not appear that there was at that time such obstruction of inter-communication between the southern and border states as to prevent the transmission and delivery of notice of the dishonor of said bill.

Wherefore, it not appearing to have been either illegal or morally or physically impossible to give notice of said protest, the judgment is affirmed. <sup>4</sup>

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<sup>4</sup> See criticism of this doctrine in 2 Daniel on Neg. Inst., § 1062. — H.

IV. When notice may be dispensed with.<sup>5</sup>

## 1. WHEN NOTICE NEED NOT BE GIVEN TO DRAWER.

§ 185

GOWAN *v.* JACKSON.

20 JOHNSON (N. Y.) 176. — 1822.

ACTION against drawer of bill drawn on Jackson and Brothers. There was no notice of dishonor, but to excuse this plaintiff offered to prove that defendant was a member of the firm on which the bill was drawn, and was allowed to do so. Judgment for plaintiff.

SPENCER, Ch. J. \* \* \* Considering it, then, as established, that the partnership existed when the bill was drawn and presented, the question arises, whether notice of non-acceptance was required to be given to the defendant. It was proved that the bill was presented for payment on the 16th of January, 1818, and was then protested for non-acceptance; and it was presented on the 16th of April, 1818, for payment, and protested. In the absence of all other proof, the bill must be considered as drawn by one partner of the firm, on the firm itself, in relation to the partnership business; and, if so, then a knowledge by one of the firm of the dishonor of the bill, is, in point of law, knowledge by the whole firm. Daniel Jackson, the partner in London, had notice that the bill was refused acceptance and payment, for he was the person who thus refused. In *Porthouse v. Parker and others* (1 Camp. N. P. 82), Lord Ellenborough held, that where a bill had been accepted by one of the defendants, this was sufficient evidence of its having been regularly drawn; and that, the acceptor being likewise a drawer, there would be no occasion for the plaintiff to prove, that the defendants had received express notice of the dishonor of the bill, as this must necessarily have been known to one of them, and the knowledge of one was the knowledge of all. This is a very just and reasonable principle; for although Joseph Jackson is alone sued on the bill, yet, as has been already observed, it must be deemed a partnership transaction, and a knowledge by one of the firm of the dishonor of the bill was all that ought to be required.

Judgment for the plaintiffs.<sup>6</sup>

<sup>5</sup> See cases, *ante*, under §§ 139-140-142. — C.

<sup>6</sup> Accord: *Rhett v. Poe*, 2 How. (U. S.) 457; *Fuller v. Hooper*, 3 Gray (Mass.) 334.

FICTITIOUS DRAWEE. — Excuse of presentment (*ante*, § 142), and notice in the case of a fictitious drawee seems to be based upon the reason that the drawer must know that the drawee is fictitious and, therefore, that the bill cannot be presented or paid. He is, therefore, from the outset the original promisor. *Smith v. Bellamy*, 2 Starkie, 223; *Leach v. Hewitt*, 4 Taunt. 731.

DRAWEE WITHOUT CAPACITY TO CONTRACT. — The reason in this case is not so clear. Presentment does not seem to be dispensed with (*ante*, § 142, but see § 139). Then why notice, since it may be that the drawee (say an infant)

## § 185

## CATHELL v. GOODWIN.

1 HARRIS &amp; GILL (MD.) 468. — 1827.

ACTION by payee against drawer of bill of exchange. No notice of dishonor. Judgment for defendant.

DORSEY, J. \* \* \* The third position was that most obstinately contended for, which was conceived to be impreguably fortified by that part of the rule established in *Eichelberger v. Finley and Van Lear* (7 Harr. & Johns. 381), which dispenses with notice only where the drawer had no reasonable grounds to expect that his bill would be honored. The reasonableness of such expectation is matter for the court, and not for the jury, to decide. If the facts, upon which the question arises, be admitted or be undeniable, then the question becomes exclusively a matter of law to be pronounced by the court; but if the facts be controverted, or the proof be equivocal or contradictory, then it becomes a mixed question both of law and fact, in which case, the court hypothetically instruct the jury as to the law, to be by them pronounced accordingly as they may find the facts. What are the facts to be found in this case justifying the drawer's expectation that his draft would have been paid? So far from having funds in the drawee's hands, he was his debtor — no proof of such a commercial intercourse between them as would imply a mutual credit — no previous promise by the drawee to accept this or any other draft for the drawer's accommodation — no consignment of goods to the drawee, which the drawer had any reason to expect would be received in time to meet his bill, but the only proof is, that the drawee informed the payee that he expected funds of the drawer would shortly come to his hands, with which, when received, he would pay. That funds afterwards did arrive, but whether in one month, or five years after, does not appear. What may have been the expectations of the drawee, as to the receipt of funds from the drawer, is immaterial; they are not even admissible evidence in this cause. But if they were, they can have no influence on those of the drawer — into whose expectations only is the inquiry to be made. The facts in the case of *Legge v. Thorpe* (12 East, 170), and *Claridge v. Dalton* (4 Maule & Selw. 226), afford much stronger evidence of a reasonable expectation in the drawers that their bills

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will honor and pay the bill? See the reasoning in *Wyman v. Adams*, 12 Cush. (Mass.) 210, which, however, was a case of indorsement. See *post*, § 186.

PRESENTMENT TO DRAWER. — This clause seems to cover the case where the drawer is, before the presentment, appointed the executor or trustee of the drawee's estate, and presentment is, therefore, made to him in his representative capacity. Actual knowledge here is, therefore, equivalent to notice. *Caunt v. Thompson*, 7 C. B. 400. But presentment must, to insure this result, be made to him in his representative capacity. *Magruder v. Bank*, 3 Pet. (U. S.) 87. And, it seems, to him personally. *Groth v. Gyger*, 31 Pa. St. 271. See *post*, § 186. — H.

would be honored, than those in the present case; yet there they were adjudged insufficient. The "reasonable grounds" required by law are not such as would excite an idle hope, a wild expectation, or a remote probability, that the bill might be honored, but such as create a full expectation, a strong probability of its payment; such indeed as would induce a merchant of common prudence and ordinary regard for his commercial credit, to draw a like bill. The facts in this case constitute no such reasonable grounds. We therefore think that the County Court erred in instructing the jury that the plaintiff was not entitled to recover, and consequently reverse their judgment.

Judgment reversed, and precedendo awarded. <sup>7</sup>

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## 2. WHEN NOTICE NEED NOT BE GIVEN TO INDORSER.

§ 186

### HULL v. BYERS.

90 GEORGIA, 674. — 1892.

ACTION by one indorser against a joint indorser for contribution. Defense, want of notice and protest.

Notes were made by the Augusta Athletic Association and indorsed by plaintiff, defendant, and others, being a majority of the directors of the association. At maturity, the association was insolvent.

BLECKLEY, CHIEF JUSTICE. — Good sense, good morality, and good law are one and the same so long as they are not sundered violently by legislation or ignorantly by judicial error. Their unity and identity, so far as one of the questions in this case is concerned, we find still intact. There is no statute to drive, neither is there any precedent to lead, decision into absurdity or injustice. We can and do hold that accommodation indorsers who represent their insolvent principal in procuring a loan of money for the principal's use, upon a promissory note which they cause to be made in his name and which they indorse in their own names, they having at the time full control of his business and all his assets, and their relation to him being such as to make it their duty to see that the note is provided for and paid at maturity, are not entitled to notice of its dishonor. May be they do not stand in his shoes; if they do not, it is because they are his shoemakers and have suffered him to become and remain barefooted. Though the debt is his and not their own, primarily, yet, having all his assets and full power

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<sup>7</sup> See also *Robinson v. Ames*, 20 Johns. (N. Y.) 146, *post*, 681. Accommodation drawers, who unite with the accommodated party in drawing the bill, are entitled to notice if they had reason to believe that the latter would provide funds to meet the bill. *Miser v. Trovinger's Executors*, 7 Oh. St. 281. — H.

[See extract from *West Branch Bank v. Haines*, 135 Iowa, 313, in note 8, *ante*, p. 522. — C.]



over them, and over all his business, they are bound to know all that he would be bound to know were his business and assets in his own hands and under his own management. In this instance the principal being a corporation, and the indorsers the corporate directors, the latter could have no right or reason to expect that funds would be provided for liquidating the debt unless it was done by their procurement or through their agency. The charter of the "Augusta Athletic Association" is not before us, and in its absence we must take it for granted that the directors of that corporation had the powers and were under the duties which appertain to corporate directors according to the general rules of law. Special provisions in the charter might vary these powers and duties in the given instance, but such provisions would, in order to gain recognition, have to be brought to the attention of the court. The usual rule is that all the assets and operations of a corporate business are under the government and control of the directors. A single director, or even a minority of the directors, indorsing a note for the corporation, might be entitled to notice of dishonor; for one only, or a small number, might have a right to suppose that the note would be attended to at maturity; but when the whole board, or a majority of its members, unite in the indorsement, each and all so indorsing should be charged with the duty and responsibility of protecting the paper, since the power to control the conduct of the corporation in respect to paying or not paying would be in their own hands. On the question of notice, the present case is fairly and fully within the principle of *Corney v. Da Costa* (1 Espinasse, 302), in which it was held that where the indorser of the notes of an insolvent person took effects of the insolvent to the full amount of his indorsement, he could not avail himself of the want of notice of nonpayment of the notes at maturity. The facts of the case are meagerly stated in the report, but they indicate that the indorser took the maker's effects, not merely to hold them for his protection, but for use in raising funds with which to discharge the indorsed paper. He was treated as if he were primarily liable and the debt were his own. Following the reason and spirit of that decision, these directors ought to be treated in the same way.<sup>8</sup>

With respect to the want of protest, it is true that the letter of the Code, § 2781, makes protest necessary in order to bind indorsers upon any bill or promissory note payable at a bank, thus, in effect, putting all such paper on the footing of foreign bills of exchange as to this commercial solemnity. But the requirement as to protest was not, we think, intended to be more comprehensive than the requirement as to notice.<sup>9</sup> \* \* \*

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<sup>8</sup> *Contra: Phipps v. Harding*, 70 Fed. Rep. 468. — H.

<sup>9</sup> Protest not necessary where notice dispensed with. *Legge v. Thorpe*, 12 East, 171. — H.

[The court then holds that the action is barred by the statute of limitations, being for money paid to the defendant's use and not founded directly on the notes.]<sup>1</sup>

## § 186 AMERICAN NATIONAL BANK *v.* JUNK BROS.

94 TENNESSEE, 624. — 1894.

BEARD, J. — This suit was instituted against the Junk Bros. Lumber and Manufacturing Co., a corporation with its situs in Nashville, as the indorser for value of certain domestic negotiable notes. The defendant resisted recovery on the ground that notice of dishonor of the paper was not given as the law requires. A decree having been pronounced against the corporation, it has filed the record in this court, and the action of the court below in overruling this defense is assigned as error.

Before coming to the general question raised by the assignments, it is proper to dispose of five of these notes, which are shown by the proof to have been made for the accommodation of this corporation and afterwards indorsed by it to the complainant. As to these notes, their makers stood in the situation of sureties to the indorser, and it was the latter's duty to provide funds to meet them at maturity, and it was, therefore, bound to the holder without presentment, protest, or notice. (2 Am. & Eng. Ency. of Law, 399; 2 Daniel on Neg. Inst., § 1085; 3 Randolph on Com. Paper, § 1205; *Black v. Fizer*, 10 Heis. 48.) Thus disposing of those five notes, the question recurs as to the liability of the defendant as indorser of the remaining thirty-five.

[The court then holds that as to these, notice addressed to the company and received by its assignee for the benefit of creditors is sufficient, and that notice addressed to the assignee is equally sufficient.]<sup>2</sup>

Judgment affirmed.<sup>3</sup>

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<sup>1</sup> This case was distinguished in *Ennis v. Reynolds*, 127 Ga. 112, where it was held that the fact that a note is payable at the bank of which the indorser is president and a director does not, of itself, dispense with the necessity of notice and protest to charge the indorser. — C.

<sup>2</sup> See also *Moreland's Adm'r v. Citizens' Sav. Bk.*, 114 Ky. 577, *post*, p. 696. — C.

<sup>3</sup> Accord: *Blenderman v. Price*, 50 N. J. L. 296; *Rhett v. Poe*, 2 How. (U. S.) 457. — H.

[In *Mercantile Bank of Memphis v. Busby*, 120 Tenn. 652, 667, McAllister, J., said: "In our opinion the facts disclosed in this record show that this note was in reality executed for the benefit of every person whose name appears upon it. As already stated, it is established in proof that this was an obligation of the B. I. Busby corporation, and that these parties were all stockholders and directors, and that the note was executed for the purpose of re-

## 3. WHEN NOTICE TO DRAWER OR INDORSER DISPENSED WITH.

(a) *Due diligence.*

§ 183 RANSOM *v.* MACK, 2 Hill (N. Y.), 587, 592. — (1842). *By the Court*, BRONSON, J. — The next inquiry is, whether the defendant was discharged in consequence of the misdirection of the notice. It was sent to North Adams, when it should have been sent to the Appling office. The defendant's place of residence not being known, the notary made inquiry of Robbins, the second indorser, who professed to be able to give the necessary information, and was interested to speak truly. The answer of Robbins was, that the notice should be sent to North Adams — that being the office where the defendant got his letters and papers. Although Robbins was mistaken, the notary was well warranted in acting upon information thus obtained, without pushing his inquiries further. There was due diligence, and that is enough. (*Bank of Utica v. Bender*, 21 Wend. 643.) That case was affirmed on error brought in June, 1841. Drawers and indorsers can easily prevent mistakes of this kind, by writing under their names their places of residence or the place where they desire notice should be sent in case the bill or note is protested.<sup>4</sup>

(b) *Waiver.*

## § 180

GOVE *v.* VINING.

7 METCALF (MASS.) 212. — 1843.

ACTION against indorser. Defense, want of demand and notice. The indorser, shortly before maturity, requested the holder not to sue the note until the maker saw the holder.

SHAW, C. J. \* \* \* The court are of opinion that when the indorser, at or shortly before the time when the note becomes due, says to the holder, that an arrangement for its payment is about being made, and in direct terms, or by reasonable implication, requests the holder to wait or give time, it amounts to an assurance that the note will be paid — that the promisor or indorser will pay

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newing an outstanding indebtedness of the corporation. . . . Our conclusion on this branch of the case is that C. B. Blackburn was not entitled to notice of dishonor, since he was a joint maker and equally interested in the note with his co-makers and indorsers." — C.]

<sup>4</sup> Accord: *Lambert v. Ghiselin*, 9 How. (U. S.) 552; *Central N. B. v. Adams*, 11 S. Car. 452. Merely consulting a directory is not due diligence. *Bacon v. Hanna*, 137 N. Y. 379. Nor casual inquiries. *Spencer v. Bank*, 3 Hill (N. Y.) 520. See 2 Daniel on Neg. Inst., §§ 1114–1123. — H.

it—and is a waiver of demand and notice. It tends to put the holder off his guard, and induces him to forego making a demand at the proper time and place; and it would be contrary to good faith, to set up such want of demand and notice—caused perhaps by such forbearance—as a ground of defense. (*Leffingwell v. White*, 1 Johns. Cas. 99; *Mechanics' Bank v. Griswold*, 7 Wend. 165; *Leonard v. Gary*, 10 Wend. 504; *Taunton Bank v. Richardson*, 5 Pick. 436; *Thornton v. Wynn*, 12 Wheat. 183; *Wood v. Brown*, 1 Stark. R. 217.)  
Judgment for the plaintiffs.<sup>5</sup>

<sup>5</sup> A waiver in the instrument itself binds all subsequent indorsers. *Phillips v. Dippo*, 93 Iowa, 35. It is not therefore a material alteration in such a case to write above the indorser's name, "Payment guaranteed." *Iowa Valley State Bank v. Sigstad*, 96 Iowa, 491.

**PAROL WAIVER AT TIME OF INDORSEMENT.**—In some jurisdictions it is held that a parol waiver made at the time of the indorsement may be shown on the theory that such evidence does not vary the terms of the written contract but establishes the waiver of a condition otherwise imported into the contract by the rules of the law merchant. *Schmied v. Frank*, 86 Ind. 250; *Lane v. Steward*, 20 Me. 98; *Dye v. Scott*, 35 Oh. St. 194; *Annvile Nat. Bk. v. Kettering*, 106 Pa. St. 531. In other jurisdictions it is held that such evidence does vary the terms of the written contract, and is therefore inadmissible. *Goldman v. Davis*, 23 Cal. 256; *Farwell v. St. Paul Trust Co.*, 45 Minn. 495; *Rodney v. Wilson*, 67 Mo. 123; *Beeler v. Frost*, 70 Mo. 185; *Bank v. Smith*, 47 Barb. (N. Y.) 489. Some jurisdictions now provide by statute that all waivers must be in writing. Maine R. S., c. 32, § 10.

A parol waiver, subsequent to the time of the indorsement, is (independent of statute) good. *Markland v. McDaniel*, 51 Kans. 350; *Rodney v. Wilson*, 67 Mo. 123; 2 Daniel on Neg. Inst., § 1098.

A promise to pay the instrument, made by an indorser after maturity and after he is discharged for want of demand or notice, is, in analogy with the promise to pay a debt barred by the statute of limitations, held to be binding. *Ross v. Hurd*, 71 N. Y. 14; *Rindge v. Kimball*, 124 Mass. 209; *Breed v. Hillhouse*, 7 Conn. 523; *Oxnard v. Varnum*, 111 Pa. St. 193; *Smith v. Curlee*, 59 Ill. 221; *Parsons v. Dickinson*, 23 Mich. 56. Contra: *Sebree Deposit Bank v. Moreland*, 96 Ky. 150, where it is held that such a promise is presumptive evidence that demand and notice were had, but that the presumption may be rebutted.

In order that the indorser may be bound by such subsequent promise he must have knowledge of the laches, and all the material facts constituting such laches. *Parks v. Smith*, 155 Mass. 26; *Bank v. Bank*, 49 Oh. St. 351; *Schierl v. Baumel*, 75 Wis. 69. But it is not necessary that he should understand the legal effect of such laches. *Cheshire v. Taylor*, 29 Iowa, 492; *Givens v. Bank*, 85 Ill. 444; *Matthews v. Allen*, 16 Gray (Mass.) 594.

Waiver, at or before maturity, of presentment and notice upon an instrument indorsed by a partnership may be by one of the partners, as agent of the others, and this even though the partnership is dissolved, since it does not create a new liability. *Seldner v. Mount Jackson N. B.*, 66 Md. 488; *Star Wagon Co. v. Swezey*, 52 Iowa, 391. But it seems that waiver after maturity, the firm being discharged for want of presentment or notice, would not revive the obligation. 2 Daniel on Neg. Inst., § 1109a, citing *Hart v. Long*, 1 Rob. (La.) 83; *Mauney v. Coit*, 80 N. C. 300; *Baer v. Leppert*, 12 Hun (N. Y.) 516.—H.

§ 180 BURGETTSTOWN NATIONAL BANK *v.* NILL.

213 PENNSYLVANIA STATE, 456. — 1906.

ACTION against indorser who eighteen months after maturity indorsed on the note a waiver of protest. Judgment for plaintiff and defendant appeals.

MESTREZAT, J. \* \* \* The plaintiff's cashier called on the defendant in March or April, 1904, and secured his signature to the writing on the back of the note waiving protest. Until that time the defendant says he had no notice that Swaney, the maker, had not paid the note. He was then told, as averred in the affidavit, "that the note in the form in which it then was, not having been protested and no notice of dishonor having been given to affiant or demand made upon affiant for the payment thereof, was objected to by the bank examiner." The defendant, therefore, knew before he signed the waiver of protest that no demand for payment had been made and that no notice of the dishonor of the note had been given him as the indorser. Hence he had full knowledge of the laches of the holder of the note when he waived protest of the instrument. Under these facts, which are disclosed by the affidavit of defense, the defendant could waive the laches of the holder in making demand for payment and in giving notice of the dishonor of the note. 4 Am. & Eng. Enc. Law (2d Ed.) 453; *Day v. Ridgway*, 17 Pa. 303; *Annaville National Bank v. Kettering*, 106 Pa. 531. "An indorser is entitled to notice of protest of a negotiable note," says Mr. Justice Coutler in delivering the opinion in *Day v. Ridgway*, "because the contract is that the maker will pay at maturity; and the strict punctuality, which is the life of the commercial law, authorizes the indorser to presume that he has paid, in the absence of any notice to the contrary. But the right to receive notice in order to make him liable, like any other right, may be waived by the indorser." In the *Kettering Case*, Sterrett, J., delivering the opinion, says (page 533): "No principle of the law merchant is better settled than that demand and notice of the non-payment of a negotiable note may be waived by the indorser, either orally or in writing, or by acts clearly calculated to mislead the holder and prevent him from treating the note as he otherwise would; but there is some diversity of opinion as to what constitutes a waiver of these necessary prerequisites to charge the indorser."

The indorser may waive protest after the date of maturity of the note with like effect as if done prior to that date. *Barclay v. Weaver*, 19 Pa. 396; *Hoadley v. Bliss*, 9 Ga. 303; *Sheldon v. Horton*, 43 N. Y. 93; *Ross v. Hurd*, 71 N. Y. 14; *Rindge v. Kimball*, 124 Mass. 209; 1 Parsons on Notes and Bills, 594; 2 Randolph on Commercial Paper, § 1456. In *Barclay v. Weaver*, this court said (page 401): "It seems, therefore, that the duty of demand and notice, in order to hold an indorser, is not a part of the contract, but a step

in the legal remedy, that may be waived at any time in accordance with the maxim '*Quilibet potest renunciare juri pro se introducto.*'" In some jurisdictions it is held that the waiver, when made after the maturity of the note, must be with full knowledge of the indorser's laches and that it requires a new consideration. But it is settled by numerous American authorities that a waiver of protest need not be supported by a new consideration. *Neal v. Wood*, 23 Ind. 523; *Hughes v. Bowen*, 15 Iowa, 446; *Cheshire v. Taylor*, 29 Iowa, 492; *Sheldon v. Horton*, 43 N. Y. 93; *Tebbetts v. Dowd*, 23 Wend. 379; *Wall v. Bry*, 1 La. Ann. 312; *Lane v. Steward*, 20 Me. 98.

We know of no decision of this court holding that such waiver must be supported by a new consideration. The contrary rule, however, is distinctly recognized in *Barclay v. Weaver*, 19 Pa. 396. In that case Mr. Justice Lowrie, in construing the contract of an indorser of negotiable paper, says (page 400): "The most, therefore, that can be said of an indorsement of negotiable paper, is that from it there is implied a contract to pay, on condition of the usual demand and notice, and that this implication is liable to be changed on the appearance of circumstances inconsistent with it, whether those circumstances be shown orally or in writing. But it may well be questioned whether the condition of demand and notice is truly part of the contract, or only a step in the legal remedy upon it. If it is part of the contract, how can it be effectually dispensed with without a new contract for a sufficient consideration, especially after the maturity of the note? Yet there are decisions without number that a waiver of it during the currency or after the maturity of the note will save from the consequences of its omission. This could not be if it was a condition of the contract, for then the omission of it would discharge the indorser both morally and legally; and no new promise afterwards, even with full knowledge of the facts, could be of any validity. If, however, an indorsement without other circumstances be regarded as an implied contract to pay, provided the holder use such diligence that the indorser loses nothing by his negligence or indulgence, then it accords with all these decisions. Then the law, and not the contract, declares the usual demand and notice to be in all cases conclusive, and in some cases necessary evidence of such diligence. \* \* \* It [the law] therefore is perfectly consistent in declaring that an indorser is bound by a new promise, after he knows of the omission of demand and notice; for this is an admission that he was not entitled to it, or has not suffered for want of it. It declares demand and notice necessary, in some cases, to save an indorser from loss, and it declares that his own admission may be submitted for them." It is manifest, therefore, that from the nature of the indorser's contract a new consideration is not required to support a waiver of protest before or after maturity of the paper. \* \* \*

The assignments of error are overruled, and the judgment of the court below is affirmed.<sup>6</sup>

## § 182

## SHAW v. McNEILL.

95 NORTH CAROLINA, 535. — 1886.

**ACTION** against indorser of inland bill of exchange for \$90 upon the margin of which were the words "No protest." There was no notice of dishonor. After dishonor defendant offered to pay \$60 for the draft. Judgment for plaintiff.

ASHE, J. \* \* \*. His Honor charged the jury that they might consider the words "No protest," on the draft, and the language and conduct of defendant when he was informed by the plaintiff of the non-payment, and the offer to pay \$60.00; and that if the defendant had offered to pay \$60.00, as alleged by Shaw, it amounts to a waiver.

We find no such error in the charge as entitles the defendant to a new trial. There is some fluctuation in the decisions of the courts upon the question, how far a promise to pay a part of a draft is a waiver of demand and notice of non-payment. For instance, it has been held by some of the authorities, that when the promise is only as to part of the sum, it is only a waiver *pro tanto*, and the plaintiff could only recover that amount. (*Fletcher v. Froggart*, 2 Car. & P. 569, 12 E. C. L. R.) On the other hand, it has been held, that "a promise to pay generally, or a promise to pay a part, or a part payment made with a full knowledge that he has been fully released from liability on the bill by the neglect of the holder, will operate as a waiver, and bind the party who makes it for the payment of the whole bill." (*Dixon v. Elliot*, 5 Car. & P. 437; *Margetson v. Aitkin*, 3 Car. & P. 388; *Harvey v. Troupe*, 23 Miss. 538.) So it would seem, that the weight of the authorities, supported the charge of the judge in this particular.

But aside from this, his Honor, in his charge to the jury, told them they might consider the words "No protest," written on the margin of the draft, as evidence of a waiver of notice of presentment and non-payment. The words "No protest," written on the margin of this draft, must have been put there with an object, and we can conceive of none other than to dispense with the notice of presentment and refusal to pay, otherwise it is unmeaning.

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<sup>6</sup> This case is reported with notes in 3 L. N. S. 1079 and in 5 A. & E. Ann. Cas. 476.

See also *Sebree Deposit Bank v. Moreland*, 96 Ky. 150, reported in 29 L. R. A. 305, with exhaustive note entitled "Necessity of new consideration to support a waiver of failure to give notice of dishonor or subsequent promise by indorser." — C.

It is well settled that protest, being a part of the custom of merchants which is essential in foreign bills to fix the drawee and indorsers with liability, is not necessary for such a purpose in inland bills. (*Hubbard v. Troy*, 2 Ired. 134; 1 Parsons on Notes and Bills, 643.) But even in foreign bills the protest may be waived. There the words, "I waive protest," or "Waiving protest," or any similar words, infer that the protest is waived, and when applied to foreign bills, was universally regarded as expressly waiving presentment and notice, the protest being, according to the law merchant, the formal and necessary evidence of the dishonor of such an instrument. In waiving "protest," the party is considered not only as dispensing with a formality, but as dispensing with the necessity of the steps which must precede it, and of which it is merely the formal, though necessary, proof of what the law required. (2 Daniel on Neg. Inst., § 1095.) But when the waiver of protest is applied to inland bills, the protest having no application to such instruments, there is a diversity of opinion in the courts and text-books, whether such a waiver would have the effect of dispensing with notice in an action upon an inland bill. But the better opinion is, that as the word "protest" has by general usage a well-known signification, and wherever it is used, it is supposed to mean something more than the formal declarations of a notary. Hence, Mr. Daniel, who is a very high authority on the subject, says, "The weight, as well as the number of authorities, predominates in favor of construing a waiver of 'protest' to signify as much when applied to inland bills and notes, as when used in respect to a foreign bill."

"Inland bills and promissory notes may be protested, by statutory enactments, in many states, and the protest is accorded the same effect as to them, when it is made, though it is not necessary to make it, and the weight, as well as the number of authorities, predominate in favor of construing a waiver of protest to signify as much when applied to inland bills and notes, as when used in respect to a foreign bill." (§ 1095a, and the cases cited in note 2.)

The doctrine there laid down, must then apply to this bill, for we have a statute which provides that when it may be necessary to prove a demand upon, or notice to, the drawer or indorser of a bill of exchange, or a promissory note, or other negotiable security, the protest taken before a proper officer shall be *prima facie* evidence that such demand was made, or notice given, in the manner set forth in the protest. (The Code, § 49.)

Our conclusion is, there was no error. The judgment of the Superior Court is therefore affirmed.

No error.

Affirmed.<sup>7</sup>

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<sup>7</sup> Waiver of protest is waiver of presentment and notice. There seems to be no decision on this point as far as concerns a foreign bill of exchange, although the text writers lay down the rule in positive terms. 2 Daniel on Neg. Inst.



*(c) Notice of non-payment where acceptance refused.*

§ 187

DE LA TORRE v. BARCLAY.

1 STARKIE (K. B.) 7. — 1814.

ACTION against drawer of a bill. Defense, want of protest and notice.

"But on further inquiry, it turned out that the defendants' objection did not relate to the want of protest upon the first dishonor of the bill, but to the want of protest on the bill being refused payment on a subsequent presentment at the defendants' request.

"Upon this explanation, Lord Ellenborough was of opinion that the answer amounted to an admission of liability, since the second protest was perfectly gratuitous and unnecessary."

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§ 1095; *Broun v. Hull*, 33 Gratt. (Va.) 23, 31 (*dictum*). In the case of inland bills and promissory notes, the conclusion is general that "waiving protest" waives presentment for payment and notice of dishonor. *Lancaster First N. B. v. Hartman*, 110 Pa. St. 196; *Johnson v. Parsons*, 140 Mass. 173; *Jaccard v. Anderson*, 37 Mo. 91; *Carpenter v. Reynolds*, 42 Miss. 807; *Hood v. Hallenbeck*, 7 Hun (N. Y.) 364; *Porter v. Kemball*, 53 Barb. (N. Y.) 467; *Coddington v. Davis*, 1 N. Y. 186. — H.

[In *Sprague v. Fletcher*, 8 Or. 367, the defendant, who was an accommodation indorser, indorsed on the back of a note before due these words: "I hereby waive notice of protest for nonpayment." Held, not to be a waiver of demand of payment from the maker when due. Agreements of this character are to be construed strictly, and not extended beyond the fair import of the terms. Prim, J., at p. 369, said: "In this case the indorser does not say that he will waive demand of payment, but that he will 'waive notice of protest for nonpayment.' Demand and notice are two distinct things, both of which are necessary to charge an indorser, and only one of them is waived by the indorser in this case. But it is claimed by appellant that the indorsement operated as waiver of both, and the following decisions are cited to sustain the proposition. (*Coddington v. Davis*, 3 Denio, 16; *Matthey v. Galley*, 4 Cal. 63; 19 Ind. 110). In *Coddington v. Davis*, the indorser wrote to the holder as follows: 'You need not protest. T. B. C.'s note due, etc. I will waive the necessity of protest.' This was held sufficient to dispense with a presentment and notice of non-payment, on the ground that the word 'protest,' as used by the indorser, in connection with the promissory note, was understood to mean the taking of such steps as were required by law to charge an indorser; that is, protest was understood to include both demand and notice. Although in a technical sense, the term protest means only a formal declaration drawn up and signed by the notary, yet as used by commercial men it includes all the steps necessary to charge an indorser. (Burrill's Law Dict. 349; 2 Ohio, N. S. 345.) The case in 4 California is in point, but not a single case is cited in the opinion to sustain it. The case in 19 Indiana does not come up to this case. There the agreement was that 'protest and notice of protest were waived,' and were held sufficient to include waiver of demand. Thus it will be seen that none of the cases cited sustain the proposition of appellant except the California case, while there are numerous decisions holding the contrary doctrine. (6 Mass. 524; *Freeman v. O'Brien*, 38 Iowa, 406; *Scott v. Green*, 10 Penn. St. 103.)" — C.]

(d) *Effect of omission to give notice of non-acceptance.*

§ 188

DUNN v. O'KEEFE.

5 MAULE & SELWIN (KING'S BENCH) 282. — 1816.

DEFENDANTS drew a bill of exchange on Rickets, Thorne, George & Co., dated June 19, 1813, and payable one month after date to the order of one Sinclair. Before the maturity of the bill, Sinclair indorsed it to the plaintiff, who on July 13, 1813, presented it to the drawees for acceptance. The drawees refused to accept, and plaintiff thereupon duly notified defendants of the dishonor of the bill.

The defendants pleaded in bar of the action that before the indorsement of the bill to the plaintiff and its presentment by the latter for acceptance, the bill had been presented by Sinclair to the drawees for acceptance, that they had refused acceptance, and that notice of such refusal had not been given to the defendants.

Judgment for plaintiff, and defendants bring error.

LORD ELLENBOROUGH, C. J. — At a very late period, after the law merchant, as it regards the subject of bills of exchange, had obtained for many centuries, the cases of *Blesard v. Hirst*<sup>8</sup> and *Goodall v. Dolley*<sup>9</sup> were decided. I do not mean to insinuate anything against the authority of those decisions. They establish this, that if the party holding a bill of exchange, receive notice of its dishonor, he is bound to communicate this to the drawer. But it has not yet been determined that the want of notice operates further than a personal discharge of the drawer, as against the party failing to give the necessary notice, nor that an innocent indorsee shall be barred of his action by any latent defect in the transfer, or concoction of the bill, except in the two cases of the bill being given on a gaming or usurious consideration. The inconvenience of a more extended doctrine must be apparent; for, suppose the holder to be the eleventh person into whose hands an unaccepted bill has passed, in succession, by indorsement; the bill arrives at maturity, and is presented, in due course, for payment, and payment is refused, and notice is given to the drawer. According to the doctrine of to-day, the holder is not in a condition to maintain his action, unless he can steer clear of any vice which the bill may have acquired, by having been tendered for acceptance by some one of the numerous holders through whose hands it has passed. A long inquiry must be instituted through the whole series of indorsees, in order to ascertain if any previous presentment was made, and in what manner it was dealt with. Would it be possible to conduct the negotiation of bills of exchange if all this investigation were necessary? What

<sup>8</sup> 5 Burr. 2670. — C.

<sup>9</sup> 1 Term Rep. 712. — C.

means has the holder of gaining this information? Must it be obtained by private inquiry? That, as it seems to me, would tend to cast, about bills of exchange, a precarious character, that would affect their credit, and, perhaps, totally exclude them from circulation. The cases of *Blesard v. Hirst* and *Goodall v. Dolley*, decided, that the indorser should be discharged, but that was as between the indorser and the party guilty of laches, which the plaintiff, in both those cases, was. It may be material to give the drawer notice, in order to enable him to withdraw his effects. This, therefore, may form a sound exception as against the party guilty of laches, but it is a very different consideration, whether it shall vitiate the bill in the hands of an innocent indorsee, like the cases of usury or gaming. It is argued that the drawer is only conditionally liable, if the bill be dishonored by non-acceptance or nonpayment, provided he has notice. But it is no part of the condition, that he shall be discharged *quoad* every holder, if the dishonor be not within the knowledge of the holder. Such a position, I believe, is not laid down in any case, and would, as it seems to me, be carrying the doctrine further than is necessary or convenient, involving, perhaps, the negotiation of bills of exchange in precarious uncertainty. The drawer who issues his bill into the world, without procuring its acceptance, is not without some degree of blame. He issues it in an imperfect state, and cannot justly complain of the neglect of any indorsee who takes the bill in this state, being cognizant of no circumstances to vitiate it, and looking merely at the names upon it. Upon the whole, it appears to me, that no authority has pronounced that a bill of exchange shall be void security, in the hands of an innocent indorsee, who has no knowledge that the bill has ever been dishonored, because a former holder has omitted to give notice to the drawer that the drawee has refused acceptance; and that such a doctrine would be destructive of the very policy and effect of this species of instrument, by rendering its credit of so precarious a nature, that no person would be found willing to trust to it, especially if a number of names were indorsed upon it.

BAYLEY, J. \* \* \* The drawer might avoid all difficulty by drawing the bill payable to his own order, and procuring an acceptance before issuing it. If he draw it payable to a third person, and issue it in its unaccepted state, the imperfection lies at his door, and he must take the consequence. \* \* \*

HOLROYD, J. — I am of the same opinion, that there ought to be judgment for the defendant in error. This conclusion, I think, follows from some of the principles laid down in argument on the other side. I agree in the position that the drawer undertakes that the drawee shall accept and pay. If the holder tender the bill for acceptance, and acceptance is refused, he knows that the drawer is thereby defeated in his expectation; therefore, it becomes his duty to give notice to the drawer, and if he neglect this, he is guilty of laches,

and ought to suffer for his negligence rather than the drawer. This was the ground on which the case of *Blesard v. Hirst* was determined. But such is not the present case, where the bill, in its unaccepted state, has passed into the hands of a *bona fide* indorsee to whom no laches is imputable. Upon the principle already laid down, the drawer, in such a case, holds out to the indorsee that the bill will be accepted and paid; and if this fails, ought he not to suffer rather than the indorsee who hath no knowledge whatever that the bill has been dishonored? The case of *Roscow v. Hardy*<sup>10</sup> differs from this, because there the plaintiff took up the bill of his own wrong, after the holder by his laches had discharged the drawer and prior indorsers, and therefore it was properly holden, that the plaintiff could not recover against a prior indorser. The greater part of the learned counsel's argument would apply to the case of a stolen bill, where the felon has indorsed it to a *bona fide* holder; but what says the law in such case? Not that the indorsee takes the bill on the individual credit of the felon, so that he must stand or fall by the felon's title, but that he shall recover on his own title, seeing that he might take the bill on the credit of all the names which appear on the bill. Usury and gaming considerations render the bill void in its original formation. I remember the case in *Douglas*<sup>11</sup>, where the court reluctantly yielded to that doctrine. This is not the case of a void bill; the indorsee is chargeable with no negligence, and I, therefore, think that the drawer is still liable.

Judgment affirmed.

## V. Duties of holder: protest.

§ 189 SUSSEX BANK *v.* BALDWIN.<sup>12</sup>

[Reported herein at p. 480.]

§ 189 BANK OF ROCHESTER *v.* GRAY.

2 HILL (N. Y.) 227. — 1842.

ACTION against indorser. Defense, want of notice. The bill was drawn in Rochester, N. Y., payable in Boston, Mass. It was presented by a notary in Boston and on dishonor a certificate of protest was

<sup>10</sup> 12 East, 434. — C.

<sup>11</sup> See *Lowe v. Waller*, Doug. 736.

<sup>12</sup> When protest is necessary, the protest fees may be recovered as damages. *Morgan v. Reintzel*, 7 Cranch (U. S.) 273; *Ticknor v. Branch Bank*, 3 Ala. 135.

Where protest is useless, protest fees cannot be recovered. *German v. Ritchie*, 9 Kans. 106; *Wooley v. Van Valkenburgh*, 16 Kans. 20; *Waddell's Succession*, 44 La. Ann. 361. Where protest is proper, but not necessary, as where it is authorized by statute in case of dishonor of an inland bill or a promissory note, protest fees may be recovered. *Legg v. Vinal*, 165 Mass. 555; *Merritt v. Benton*, 10 Wend. (N. Y.) 117; 2 Daniel on Neg. Inst., § 933. Contra: *Johnson v. Bank*, 29 Ga. 260; 1 Parsons N. & B. 646. — H.

drawn up in due form, stating, among other things, that the notary transmitted notice of dishonor to the drawer and indorsers, etc. This certificate was the only proof of notice of dishonor offered by plaintiff.

*By the Court*, COWEN, J. [After deciding that a notarial seal stamped directly upon the paper, without the use of a wafer, is not a good common-law seal]. Suppose the protest had been duly authenticated, was the addition of a certificate stating notice of protest to the defendant admissible? It was said to be evidence by Johnson, J., in *Cape Fear Bank v. Stinemetz* (1 Hill's Law Rep. S. Car. 45); and what I said in *Halliday v. McDougall* (20 Wend. 85), is now relied upon, and perhaps rightly, as intimating an impression that he was right. The point decided in the last case was, however, that the giving of notice being the usual, not official duty of the foreign notary, and he being dead, the entry in his official record of notice being sent might be received by way of memorandum as secondary evidence. I admitted that it might not be his official business; and instituted no particular examination whether it was or not. The learned counsel for the plaintiffs has not been able to furnish anything more than what I have there mentioned, going to support the notary's certificate as evidence of notice. I have been equally unsuccessful after considerable search. On the contrary, I find it expressly asserted in Brooke's Office of Notary (pp. 79 and 139), that the giving of notice is no part of his province or duty as notary. In the late case of *Fitler v. Morris* (6 Whart. 406, 415, March T. 1841), this very question was a good deal considered by the Supreme Court of Pennsylvania; and they held, that though by the local law of that state, the giving of notice is a notarial act, and on that ground proveable by his certificate, yet this is an exception to the common law. They therefore refused to receive a notarial certificate made in Alabama, as evidence of notice, or anything beyond the presentment and non-acceptance. I am entirely satisfied that such is the law of England and this state.

It is scarcely necessary to observe, that our statute (Sess. 56, p. 395),<sup>13</sup> relative to proof of notice by certificate, applies to none other than notaries of this state.<sup>1</sup>

There must be a new trial; the costs to abide the event.

New trial granted.<sup>2</sup>

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<sup>13</sup> L. 1833, c. 271, § 8. Re-enacted in substance in N. Y. Code Civ. Proc. § 923. — H.

<sup>1</sup> It is now provided (Code Civ. Proc. § 925), that proof of dishonor, and notice of dishonor, of an instrument payable in another state or country, may be made in any manner authorized by the law of the state or country where it is payable. *McAndrew v. Radway*, 34 N. Y. 511; *Lawson v. Pinckney*, 40 N. Y. Super. Ct. 187. — H.

<sup>2</sup> A notarial certificate is not competent proof of service of notice in the absence of statute. *Real Estate Bank v. Bizzell*, 4 Ark. 189; *Rives v. Parmley*, 18 Ala. 256; *Schneider v. Cochrane*, 9 La. Ann. 235; *Schorr v. Woodlief*, 23 La. Ann. 473; *Swayze v. Britton*, 17 Kans. 625. Statutes now generally

## ARTICLE IX.

### DISCHARGE OF NEGOTIABLE INSTRUMENTS.

#### I. Discharge of the instrument.

##### 1. PAYMENT AND RE-TRANSFER.

§ 200

STODDARD *v.* BURTON.

41 IOWA, 582. — 1875.

ACTION against the maker on a lost or stolen promissory note payable to A, the bearer, on or before Jan. 6, 1868. Defense, payment to the holder (Thompson) on Oct. 11, 1866. Judgment for plaintiff.

DAY, J. \* \* \* The defendant asked the court to instruct the jury as follows:

"12. The note in controversy was payable on or before a certain date. This made the note payable at a fixed time absolutely, and sooner if defendant saw fit to pay it sooner. Such were the express terms of the contract, and, therefore, no presumption of bad faith can arise from the simple fact that defendant paid when he did, though by its terms payment could not have been demanded or enforced at the time. Defendant had the right to pay whenever he chose to do so."

The court refused this instruction, and gave the following:

"8. A promissory note, payable on or before two years after date, is due at the end of two years and not before; the rule of law being that the note becomes due at the time when the payee or legal holder or owner of the same has the right to demand payment, and this is true, although the note provides that the payor may at his option pay the same before the time fixed when it shall absolutely become due."

"9. The payment of a note by the payor before it becomes due, to a stranger who may have possession of the note, will not protect and discharge the maker, if said note has been stolen, or otherwise surreptitiously comes into the hands of the party presenting the same."

Other instructions given embrace the same doctrine.

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make a notarial certificate *prima facie* evidence of the giving of notice. As to these statutes and their construction, see 4 Am. & Eng. Encyc. Law (2nd ed.), pp. 389-393. Where a notary's certificate may include a certificate of notice of dishonor, such certificate of notice may be written below the body of the certificate and even below the seal. *Olcott v. Tioga R. Co.*, 27 N. Y. 546; *Jordan v. Long*, 109 Ala. 414. — H.

There was error in giving these instructions, and in refusing that asked. The note was payable to the bearer, and there is a presumption that the person in possession of it, and who presented it for payment, was the owner. It has been declared in general terms, that the payment of a note which has been lost or stolen, before it is due, does not discharge the maker from liability to the real owner, because the payment is out of the ordinary course of business. (2 Parsons on Notes and Bills, 255, and cases cited.)<sup>1</sup>

But the note in question, by its express provisions, at the option of the maker, is payable at any time within two years from its date. Whilst the holder could not enforce payment before January 6, 1868, yet the maker might claim the right to make payment before that time. It cannot be said to be out of the ordinary course of business for the maker to insist upon a provision which was incorporated for his benefit. No presumption against the *bona fides* of the defendant can arise from the time of making payment.

The defendant asked the court to instruct in substance that, if Burton paid the note to Thompson in good faith, Thompson being in possession of it, and believing him to be the owner, without actual notice or knowledge that it was stolen, then Burton was protected by such payment, and that mere suspicion on Burton's part as to Thompson's right to demand payment or negligence in making inquiries was not enough to invalidate payment; but to do so, it must appear that Burton had acted in bad faith. The court refused this instruction, and in substance directed that a payment made under circumstances that would put a reasonably prudent man upon inquiry as to Thompson's right to receive payment would not protect nor discharge defendant.

This action was erroneous. Mere suspicion that a person in possession of a note payable to bearer may not be the owner, will not exonerate the maker from payment; but there must be circumstances amounting to clear proof that he is a fraudulent holder.<sup>2</sup> (Story on Prom. Notes, § 613, and cases cited; *Gage v. Sharp*, 24 Iowa, 15; *Lake v. Reed*, 29 Id. 258; *Goodman v. Simonds*, 20 How. 343; 1 Parsons on Notes and Bills, 238; 2 Id. 212, 279.)

For the errors discussed, the judgment is

Reversed.<sup>3</sup>

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<sup>1</sup> Disapproved in *Bainbridge v. City of Louisville*, 83 Ky. 285. — H.

<sup>2</sup> See § 95. — H.

<sup>3</sup> See § 148. Cf. *Buehler v. McCormick*, 169 Ill. 269. If an instrument is paid before maturity and a cancellation legend stamped upon it, and it is afterwards stolen, the cancellation mark effaced, and the instrument put into circulation, a purchaser for value without notice cannot recover on it against the maker. *District of Columbia v. Cornell*, 130 U. S. 655. [Distinguished in *Ehrlich v. Jennings*, 78 S. C. 269. — C.]

If a negotiable instrument is lost or stolen and the true owner duly notifies the maker, the latter must, at his peril, make sure that a subsequent payment

## § 200 AGAWAM NATIONAL BANK v. DOWNING.

169 MASSACHUSETTS, 297. — 1897.

ACTION against Edward B. Downing as maker of a note. After the note matured, plaintiff took a new note for \$450 from the indorser, William B. Downing, which included the amount of the note in suit and another note of \$200 given by X. Plaintiff retained possession of the note in suit and said note of \$200.

MORTON, J. — The defendant is the maker of the note in suit. As between him and William B. Downing, the indorser, it was an accommodation note. But there is nothing to show that this was known to the plaintiff, or that it took the note otherwise than in good faith and for value. Whether the \$450 note operated as payment of it was a question of fact depending on the intention of the parties, and the other circumstances surrounding the transaction. (*Brigham v. Lally*, 130 Mass. 485; *Dodge v. Emerson*, 131 Mass. 467; *Green v. Russell*, 132 Mass. 536; *Eames v. Cushman*, 135 Mass. 573; *Woods v. Woods*, 127 Mass. 141; *Cotton v. Bank*, 145 Mass. 45, 12 N. E. 850.) The court must have found that it did not, and its finding is conclusive. (*Brigham v. Lally*, *supra*.) There was nothing, we think, in the arrangement between the plaintiff and William B. Downing that operated to release the defendant. His liability to the plaintiff was an absolute one. Delay on its part to enforce payment, from whatever motive, or however long continued, if not for six years, would not release him. We do not see that the case is altered because the delay was at the request of the indorser, and accompanied by an agreement between the plaintiff and him that the defendant's overdue note should be regarded as security for the new note given by William B. Downing.

Exceptions overruled.<sup>4</sup>

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is to a holder in due course. *Bainbridge v. City of Louisville*, 83 Ky. 285; *Chappelear v. Martin*, 45 Oh. St. 126.

If payment be made to one who has not the possession of the instrument, it is at the peril of the payor. *Wheeler v. Guild*, 20 Pick. (Mass.) 545. So also, it seems, if the one to whom payment is made does not actually produce the instrument. *Murphy v. Barnard*, 162 Mass. 72. See also *Wilcox v. Aultman*, 64 Ga. 544; *University Bank v. Tuck*, 96 Ga. 465. If the instrument is indorsed in full, payment to any one except the indorsee (even to one in possession of the instrument) is at the peril of the payor. *Doubleday v. Kress*, 50 N. Y. 410. — H.

<sup>4</sup> Whether a renewal note is taken in payment of the former note, or merely in extension of the obligation of the former note, is a question of the intention of the parties. *Matter of Utica National Brewing Co.*, 154 N. Y. 268. — H.



## § 200

MADISON SQUARE BANK *v.* PIERCE.

137 NEW YORK, 444. — 1893.

ACTION on a promissory note. Defense, part payment by indorser. Judgment for plaintiff.

FINCH, J. — We have a novel and interesting question before us on this appeal, although its apparent importance will lessen as we pass from first impressions to some slower reflection. It arises upon facts which are very brief and simple and may at once be stated. The defendant, Pierce, made his promissory note payable to his own order and indorsed it to the Bates, Co., Limited, which indorsed it to the plaintiff bank; the latter discounting it and paying the proceeds over to the immediate indorser. Thereafter the Bates Co. became insolvent and passed into the hands of a receiver, who paid to the bank upon the liability of the indorser seventy-three and one quarter per cent. of the amount secured by the note. Later, the bank sued Pierce, the maker, and recovered judgment for the full amount of the note in spite of the proof showing the payment made by the receiver, and in disregard of the claim asserted by the defendant that he should only be held liable for the balance remaining unpaid. That judgment has been affirmed by the General Term, Judges Daniels and Barrett each writing very strong and valuable opinions in support of their doctrine, and relying upon the authority of *Jones v. Broadhurst* (9 M. G. & S. 177; 67 Eng. Com. L. 175), which fully warrants their conclusion. The question does not seem ever before to have arisen in this country, and we are left at liberty to examine the English rule and to follow it or not as we approve or disapprove its logic and its consequences.

We are not to regard the note as being accommodation paper, but must assume its transfer for value. The form of the transaction is equivalent to what it would have been if the Bates Co. had been named as payee, and loses none of its force by the intervention of the maker as first indorser. That indorsement, in the form adopted, was needed for the regular transfer of title, but does not change or affect the nature and character of the maker's liability. He remains the ultimate debtor, the person who ought to pay the debt, in preference to and in exoneration of all other parties to the paper, who in some form or other are entitled to have final recourse to him.

And it is to the case of such a maker of the note or such an acceptor of the bill of exchange that the English rule alone applies; and it is explicitly declared inapplicable where the indorser or drawer is the real debtor, although in form only secondarily liable.

Pierce, therefore, was the ultimate debtor, and the party who ought to pay the note, both in discharge of the obligation to the holder and in exoneration of the indorser. When the bank sued on the note, it was the legal holder and the legal party in interest. Upon production

of the paper and the usual proof, judgment against the maker for the full amount was inevitable, unless some defense should be interposed. The only possible one for Pierce was part payment, and he was compelled to assert, and his counsel are compelled to argue, that the money paid by the indorser to the holder inured to the benefit of the maker as a payment on his debt. But that doctrine cannot prevail for very obvious reasons. The indorser's payment did not in the least lessen or satisfy the maker's debt. He owed it all exactly as before. What had happened possibly changed somewhat the real creditor, but left the whole debt due and unpaid. To whom he should pay might become a new question, but how much he should pay in discharge of the note was not made doubtful in any degree. What the receiver advanced to the holder is familiarly described as a payment; but it was such relatively to the indorser's liability alone; while relatively to the obligation of the maker, it was an equitable purchase instead of a payment. That view of it was taken in a very early case, the decision of which depended necessarily upon it. In *Callow v. Lawrence* (3 Mau. & Sel. 95), it appeared that one Pywell drew a bill upon Lawrence to his own order, which Lawrence accepted. The drawer indorsed the bill to Taylor, who discounted it and thereafter indorsed it to Barnett. It was protested for nonpayment. The drawer paid Barnett the full amount and took the bill, and, striking off the indorsements of Taylor and Barnett, transferred the bill to Callow, who sued the acceptor upon it. The latter claimed that the bill was paid and extinguished, which the court denied, saying that the drawer "became the purchaser of the bill" when he paid and took it out of Barnett's hands; that it was not paid by the drawer, *animo solvendi*, in order to extinguish it, but only to redeem himself from the situation in which he stood. That must always be true of payment by indorser to holder, where the maker is the ultimate debtor. To the extent of the money paid, the indorser becomes equitably entitled to be substituted to the rights and remedies of the holder, and becomes *pro tanto*, the beneficial owner of the debt; so that the maker's obligation to pay the note in full, at first due to the holder solely in his own right, becomes, after the part payment by the indorser, still wholly due to the holder, but partly in his own right and partly as trustee for the indorser. A court of law cannot split the note into parts, and must act upon the legal interest and ownership.

In the present case there was no privity between maker and indorser as it respects the action of the latter. He paid not as the agent of the maker, nor at his request, not for his benefit, and under no duty to relieve him, but independently, upon his own obligation, to lessen his own responsibility, and not at all to discharge the ultimate debt which it was the maker's duty to pay. It seems very clear, therefore, that the maker cannot utilize for his own benefit a payment which, as to him, is not a payment upon the debt. It becomes, as I have said, merely a question to whom he shall pay and who may sue for and collect the

whole unpaid sum. In that question the maker has no concern beyond the inquiry whether he may become liable to different persons for the same debt and encounter the danger of paying it twice. I can discover no such peril. The judgment in favor of the holder is a bar to any other suit on the same note, and payment to the holder discharges the note utterly. Ordinarily, the indorser cannot recover except upon the note and as holder and in accordance with the law merchant. If he ever has any other right of action against the maker, it is either in equity or by force of some facts beyond the bare relation established by the paper. And where the note is merged in the holder's judgment or paid in full to him by the maker, the indorser's only right is through the judgment or against the proceeds, if he has made a partial payment to the holder. That does the indorser no wrong. If he is not content that the holder shall collect to some extent as his trustee, he may prevent it by payment in full to the holder and so entitle himself to the possession of the note on which to sue, or if judgment has been obtained, to be subrogated to all of the rights of the plaintiff therein.

I think this result is clearly indicated by our own decisions. In *Mechanics' Bank v. Hazard* (13 John. 353), the maker of the note had been arrested in an action upon it and his bail sought to relieve themselves by force of a payment made by the indorser to the holder, but such effect was denied to it; the court saying that it was not a payment by or on behalf of the maker, or of which he or his bail could avail themselves. And in *Guernsey v. Burns* (25 Wend. 411), where the suit was by the holder, representing the legal title and interest, it was said to be no defense to the maker and no concern of his that some property in the note was in another.

It thus becomes apparent that there is no very great importance in the question which method of securing payment from the maker is adopted, since the same result follows from each, and that it narrows down to the inquiry whether, as matter of correct doctrine and of convenience in practice, the holder may recover the whole debt against maker or acceptor for himself and as trustee for the indorser to the extent of his acquired interest; or whether he shall take judgment only for the balance, leaving the indorser to sue in some way and on some theory, which apparently could not be upon the note, because already merged in the judgment, but might be for money paid for the use of the maker, since he gets the benefit of it in the reduction of the judgment, as was held in *Pownal v. Ferrand* (6 B. & Cress. 439). where the holder deducted the indorser's payment from the levy against the maker. The former seems to me to be the logical and convenient method and so I think we should follow the English doctrine.

I have not underrated the assault made upon it by the appellant. He asserts that *Jones v. Broadhurst* is contrary to the earlier cases and has been criticised and shaken by the later ones. I have examined them all, with some wonder at the amount of learning and ingenuity

expended upon the subject. (*Pierson v. Dunlop*, Cowper, 571; *Walwyn v. St. Quintin*, 1 Bos. & P. 652; *Bacon v. Searles*, 1 H. Bl. 88; *Hemming v. Brook*, 1 Car. & M. 57; *Randall v. Moon*, 12 C. B. 261; *Cook v. Lister*, 13 C. B. [N. S.] 543; *Solomon v. Davis*, 1 Cahabe & Ellis, 83; *Thornton v. Maynard*, 10 Com. Pl. L. R. 695.) The prior cases were very fully and carefully reviewed by Baron Cresswell in the opinion rendered in *Jones v. Broadhurst*, and of the subsequent cases I deem it only necessary to say that, along with some criticism and occasional doubt, the doctrine has remained substantially unshaken, and the case last cited was declared by Lord Coleridge to be the accepted law.

It must not be forgotten, however, and I may prudently repeat, that the doctrine has no application to accommodation paper, and rests wholly upon the actual and ultimate indebtedness of maker or acceptor as the party who ought to pay. In such a case as that, which correctly describes the one now before us, and where no disturbing facts affect the relations of the parties as fixed by the paper itself, I think the holder may sue and recover the full amount, receiving so much of the proceeds as represents a part payment by the indorser as trustee for him.

It follows that the judgment should be affirmed, with costs.

All concur, except MAYNARD, J., dissenting.

Judgment affirmed. <sup>5</sup>

## § 200

## LANCEY v. CLARKE.

64 NEW YORK, 209. — 1876.

ACTION by holder against maker. Judgment for plaintiff at circuit. Judgment reversed at General Term. Plaintiff appeals.

EARL, J. — The defendant made the note in suit for the benefit and accommodation of the firm of Lambert and Lincoln. It was discounted and the proceeds passed to their credit by the North River Bank. Each member was therefore bound, as to the maker, to pay the note, and thus save him from liability on account thereof. Before the note became due the firm was dissolved, and Lincoln was to close up its business. Plaintiff lived in Canada, and Lincoln wrote him, requesting him to take up the note and furnish the money for that purpose. Plaintiff, a few days before the maturity of the note, sent Lincoln the money, which he placed in the bank to his individual credit. On the day the note fell due he went to the bank, and, by his individual check, paid the note to the discount clerk, who knew at the time that it was an accommodation note. He

<sup>5</sup> Payment for honor must also be distinguished. See Neg. Inst. L., §§ 300-306. — H.

did not assume to act as agent for any one, and did not ask to have the note transferred to any one, and did not mention plaintiff's name in any way. It is true that he asked to have the note protested so that he could hold the indorser and maker, but he did not disclose why he wanted to hold them. After he had thus paid and taken it, he sent it to the plaintiff.

Upon such a state of facts, did plaintiff take his title from the bank or from Lincoln? If he took it from the bank, he took the place of the bank, and his title and right to enforce it were as good as those of the bank at the time he took it. But if he took it from Lincoln, it being past due, he took it subject to any defense defendant could have made if sued by Lincoln, and in such case defendant's defense would have been perfect. He could not be successfully sued by either of the persons for whose accommodation he made the note.

Plaintiff did not take title from the bank. It matters not that he furnished the money, and that Lincoln promised to use it in taking up this note for him. It matters not that the note was protested so that the indorser and maker could be held, or that the bank did not intend absolutely to discharge and cancel the note. The question is, did the bank transfer or sell the note to the plaintiff? To make a sale or transfer takes two parties, one to sell and the other to buy, and the bank could not be made a seller without its knowledge or consent. It was not bound to sell or transfer the note. All it was bound to do was to surrender it upon payment by the person liable to pay it. A seller in such a case incurs some obligation by the sale, although he does not indorse the paper. He impliedly warrants that the paper is genuine and all it purports to be on its face, and he cannot be drawn into this implied warranty without his consent. (*Eastman v. Plumer*, 32 N. H. 238; *Delaware Bank v. Jarvis*, 20 N. Y. 226; *Morrison v. Currie*, 4 Duer, 79; *Aldrich v. Jackson*, 5 R. I. 218; 2 Parsons on Notes and Bills, 2d ed. 37.) All the bank did in this case was to take payment of the note, and deliver it up to a party paying and liable to pay, after protesting it, so that he could make such use of it as the law and the facts would authorize. It did not transfer or intend to transfer it. The plaintiff, therefore, took no title to it from the bank, but he took it from Lincoln, and cannot, therefore, enforce it against the defendant.

The order of the General Term must, therefore, be affirmed, and judgment absolute ordered against the plaintiff, with costs. All concur.

Order affirmed and judgment accordingly.\*

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\* If an instrument is retransferred to the maker or acceptor at or after maturity, the transaction is treated as a payment, and the instrument cannot be reissued or negotiated. *Harmer v. Steele*, 4 Exch. Rep. 1; *Ballard v. Greenbush*, 24 Me. 336; *Ferree v. New York, etc. Co.*, 74 Fed. Rep. 769. But if it be transferred to the maker or acceptor before maturity, the transaction may be

## § 200

WOLSTENHOLME *v.* SMITH.

[Reported herein at p. 634.]

## 2. CANCELLATION OR RENUNCIATION.

## § 203

LARKIN *v.* HARDENBROOK.

90 NEW YORK, 333. — 1882.

THIS action was brought to recover the amount of a promissory note executed by defendant to Isaac C. Loper, plaintiff's testator, which the complaint alleged had been lost or destroyed.

The referee found that said Loper executed to defendant a deed of certain premises, and in consideration thereof, the note in suit was executed, and delivered to the grantor, who thereafter voluntarily and intentionally canceled, destroyed, and surrendered up the same to the defendant.

MILLER, J. — The note described in the complaint was given by the defendant to the plaintiff's intestate, upon the conveyance to him of certain real estate, and as a consideration therefor, on the 11th day of October, 1870. The referee before whom the trial was had has found that in or about the month of January, 1871, the grantor voluntarily and intentionally canceled, destroyed, and surrendered up to the defendant said security and note, and as a conclusion of law, the intestate discharged the defendant thereon, and that no recovery could be had either on the note or on the original consideration. We think that the finding of fact by the referee is sufficiently supported by the evidence, and that the conclusion arrived at was the legal and necessary result of said finding. The rule seems to be well settled by the authorities that where an obligee delivers up the obligation which he holds against another party, with the intent and for the purpose of discharging the debt, where there is no fraud or mistake alleged or proven, that such surrender operates in law as a release and discharge of the liability thereon; nor is any consideration required to support such a transaction when it has been fully executed. (Bouv. Law Dict., title release; *Albert's Ex'rs v. Ziegler's Ex'rs*, 29 Penn. St. 50; *Beach v. Endress*, 51 Barb. 570; *Doty v. Wilson*, 5 Lans. 10.)

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shown to be a purchase and not a payment and the instrument may be re-issued. *Attenborough v. Mackenzie*, 25 L. J. Ex. 244; *Rogers v. Gallagher*, 49 Ill. 182; *West Boston Bank v. Thompson*, 124 Mass. 506; *Swope v. Ross*, 40 Pa. St. 186; *Eckert v. Cameron*, 43 Pa. St. 120. Contra: *Long v. Cynthiana Bank*, 1 Litt. (Ky.) 290; *Stark v. Alford*, 49 Tex. 260.

If an instrument is retransferred to one of two or more joint makers, before maturity, and re-issued by him, it seems that his transferee gets only a right of contribution against the other joint makers. The case is distinguished from that of a single promisor. *Stevens v. Hannan*, 86 Mich. 305; s. c., 88 Mich. 13; *Kneeldan v. Miles*, (Tex.) 24 S. W. Rep. 1113. — H.

There certainly could not be higher evidence of an intention to discharge and cancel a debt than by a destruction and surrender of the instrument which created it, to a party who is liable by virtue of the same. \* \* \*

Judgment affirmed.

§ 203

SLADE *v.* MUTRIE.

156 MASSACHUSETTS, 19. — 1892.

ACTION to recover the balance of a promissory note. The defendant paid the plaintiffs \$125 and received a receipt "in full settlement of all accounts to date," and the note. Charge: That if the plaintiffs surrendered the note to be cancelled intending to give the defendant the balance of the debt, plaintiffs could not recover; but if the note was delivered in order that defendant might exhibit it and upon defendant's promise to pay the balance, plaintiffs could recover.

The jury returned a special finding that the plaintiffs intended to receive the one hundred and twenty-five dollars "in full for the debt then due," and further returned a general verdict for the defendant; and the plaintiffs alleged exceptions.

FIELD, C. J. — The counsel for the defendant concedes that, by the law of this Commonwealth, the payment of a part of a debt after the whole debt has become payable is not a sufficient consideration to support a promise not under seal to discharge the remainder of the debt. (*Brooks v. White*, 2 Met. 283; *Harriman v. Harriman*, 12 Gray, 341; *Potter v. Green*, 6 Allen, 442; *Grinnel v. Spink*, 128 Mass. 25; *Lathrop v. Page*, 129 Mass. 19; *Tyler v. Odd Fellows' Relief Association*, 145 Mass. 134, 137; *Foakes v. Beer*, 9 App. Cas. 605.)

The jury, in returning a general verdict for the defendant, must have found on the judge's charge that the note was surrendered by the plaintiffs to the defendant that it might be cancelled, and that the plaintiffs intended by delivering the note to the defendant to give him the note and discharge the remainder of the debt.

For certain purposes, a bill of exchange or a promissory note is regarded in this Commonwealth, not merely as evidence of a debt, but as the representative of a debt, or the debt itself. Each may be the subject of a gift, but to constitute a gift there must be a delivery by the owner to the donee, with the intention of passing the title. (*Grover v. Grover*, 24 Pick. 261; *Sessions v. Moseley*, 4 Cush. 87; *Bates v. Kempton*, 7 Gray, 382; *Chase v. Redding*, 13 Gray, 418. See *Sheedy v. Roach*, 124 Mass. 472; *Pierce v. Boston Five Cents Savings Bank*, 129 Mass. 425; *Taft v. Bowker*, 132 Mass. 277; *McCann v. Randall*, 147 Mass. 81; *Cochrane v. Moore*, 25 Q. B. D. 57; *Gammon Theological Sem. v. Robbins*, 128 Ind. 85.)

It follows from this, that the delivery of a promissory note by the holder to the maker, with the intention of transferring to him the title to the note, is an extinguishment of the note, and a discharge of the obligation to pay it. (*Hale v. Rice*, 124 Mass. 292; *Stewart v. Hidden*, 13 Minn. 43; *Ellsworth v. Fogg*, 35 Vt. 355; *Vanderbeck v. Vanderbeck*, 3 Stew. 265; *Jaffray v. Davis*, 124 N. Y. 164, 170.)

Exceptions overruled.<sup>7</sup>

## § 203

## LEASE v. DEW.

102 APPELLATE DIVISION (N. Y.) 529. — 1905.<sup>8</sup>

ACTION on note given by defendant to plaintiff's testator.

The defendant offered proof that after testator's death the note in question was found among his papers, inclosed in an envelope together with the following paper, all in the handwriting of the testator, except the signature of the witness:

"NEW YORK, Nov. 25, 1901.

"To my executors.

"Gentlemen: The enclosed note I wish to be cancelled in case of my death, and if the law does not allow it I wish you to notify my heirs that it is my wish and orders.

"Truly yours,

OLIVER W. BUCKINGHAM.

"Witness:

"FRANK W. WOGLOM."

Judgment for plaintiff and defendant appeals.

HATCH, J. \* \* \* This brings us to the main question in the case — the construction of the written declaration of the testator, which was found in the envelope which contained the note after his death. It is probably true that this declaration was sufficient to discharge defendant's obligation upon the promissory note, within the authority of *Wekett v. Raby*, 2 Brown's House of Lords Rep. 386. The declaration therein was made a few days before the death of the testator, in these words: "I have Raby's bond, which I keep; I don't deliver it up, for I may live to want it more than he; but when I die he shall have it, he shall not be asked or troubled for it." Suit having been brought upon the bond, it was ordered to be delivered up and canceled, and such decision was affirmed by the House of Lords upon appeal. The declaration in the present case is, in one view, stronger than the declaration in that case, for therein there was the express intention of the testator to keep the bond as a subsisting

<sup>7</sup> See the provisions of § 62, subsec. 1 of the Bills of Exchange Act. (corresponding to § 203 of the Neg. Inst. L.), construed in *Edwards v. Walters*, 1896, 2 Ch. 157, where it was held that a delivery to the devisee of the maker was not a delivery to the maker, though, *semble*, a delivery to the executor or administrator would be. — H.

<sup>8</sup> Affirmed in 184 N. Y. 599, no opinion. — C.



obligation against Raby, and it was not to be enforced save in the event of his death, when it was to take effect. In the writing under consideration in this case there is no such expression in terms. A similar doctrine was announced in *Brinckerhoff v. Lawrence*, 2 Sandf. Ch. 412. Therein the Raby case is cited with approval. The declaration therein was, like the present, limited in its operative force to events which might happen subsequently to the death of the declarant. These cases applied the common-law rule, and, while they are authoritative declarations of the effect of this instrument at common law, they are not controlling in its construction at the present time, for the reason that the force and effect of an instrument of renunciation is now governed by the provisions of section 203 of the Negotiable Instruments Law (Laws 1897, p. 744, c. 612). It reads: "The holder may expressly renounce his rights against any party to the instrument before, at or after its maturity. An absolute and unconditional renunciation of his rights against the principal debtor made at or after the maturity of the instrument, discharges the instrument. But a renunciation does not affect the rights of a holder in due course without notice. A renunciation must be in writing unless the instrument is delivered up to the person primarily liable thereon."

This statute was taken from an act passed by the British Parliament in 1882, known as the "Bills of Exchange Act." It has been quite generally adopted in various states of the American Union. Its provisions are as follows:

"(1) When the holder of a bill at or after its maturity absolutely and unconditionally renounces his rights against the acceptor, the bill is discharged. The renunciation must be in writing, unless the bill is delivered up to the acceptor. (2) The liabilities of any party to a bill may in like manner be renounced by the holder before, at, or after its maturity, but nothing in this section shall affect the rights of a holder in due course without notice of the renunciation."

It is readily seen that these two statutes, in character and import, are alike. The only difference is change in the form of phraseology, but it affects neither the sense nor the construction. A single case has arisen in England under the provisions of this statute. *In re George*, L. R. 44 Ch. Div. 627, decided in 1890. Therein it appeared that the testator desired to have destroyed a note for £2,000 given by Mrs. Francis. Search was made for the same, that it might be destroyed, but it could not be found. At the instance of the decedent, the nurse in attendance upon him wrote at his dictation: "30th August, 1889. It is by Mr. George's dying wish that the cheque [sic] for £2,000 money lent to Mrs. Francis be destroyed as soon as found." The nurse added to this declaration the words: "Mr. George is perfectly conscious and in his sound mind. [Signed] Nurse T." This transaction took place two or three hours before death. The testator therein left a will, in which he bequeathed to Mrs. Francis, his niece, the sum of

\$6,000. The executors of the will declined to pay the bequest in full, and thereupon the legatee brought an action to determine the question as to whether the promissory note had been duly canceled. The court, under the provisions of the statute above quoted, determined that the renunciation was insufficient to discharge the note. Upon the case there presented, I should be disposed to hold that it amounted, within the terms of the act, to an unconditional renunciation of the rights of the testator against the maker of the note. The expression that it was the testator's wish that it be destroyed would seem to constitute an announced declaration to destroy the instrument, and, as such, it was a clear expression of a renunciation of his right to enforce it. In the declaration of renunciation, it is stronger than the instrument relied upon in the present case.

There is some obscurity in the provisions of our statute. In its first sentence it provides for the renunciation of the rights of the holder against any party to the instrument which may be made before, at, or after its maturity. In the second sentence it provides for an absolute and unconditional renunciation of the rights of the holder against the principal debtor at or after the maturity of the instrument, and discharges the instrument. The first relates to the party; the second, to the instrument. It is somewhat difficult to see how there could be an absolute discharge of a party to an instrument without discharging the instrument as an obligation, so far as he is concerned. We do not clearly perceive why this distinction should have been made. It is immaterial, however, to the rights of the parties to the present action. The instrument of renunciation contains no express declaration of the testator to renounce his rights in the note against the party, or of his right to enforce it as a subsisting obligation. The expression is: "I wish [the note] to be canceled in case of my death." There is nothing in these words which can be construed as expressing a renunciation of any rights either against the party or upon the instrument. Had it been delivered to the defendant during the lifetime of the testator, it would not have precluded the latter at any time upon maturity from enforcing the note. There is nothing indicating an intent upon his part not to enforce it during his lifetime. There was no delivery of it to anybody, and, while doubtless, it was sufficiently authenticated to accomplish a renunciation, it had no operative effect whatever, as it did not fall within the statute or comply with its terms.

In principle, the question raised by this case has been decided by this court. *Dimon v. Keery*, 54 App. Div. 318. Therein the plaintiff's intestate loaned to the defendant a sum of money, taking her promissory note in writing, wherein she agreed to pay the same, with interest, on demand. At the time the note was delivered, the testator indorsed thereon the words: "At my death the above note becomes null and void. Stephen C. Dimon." Dimon continued to retain possession of the note, and the defendant paid interest thereon, but no

principal. Dimon died about three years after the execution and delivery of the note. In an action to enforce the same by his administrator, the defendant was held liable thereon, as the indorsement was a mere declaration by the payee of the note as to his intention concerning it, but that it was insufficient as constituting either a gift of money, or an agreement to discharge it as an obligation. The court therein did not discuss the statute which is here the subject of consideration. It is manifest, however, that the declaration indorsed upon the note was not a renunciation of the liability of the maker during the lifetime of the deceased, or of any renunciation of the obligation of the instrument; and, as it did not constitute a gift or an agreement, it neither fell within the terms of the statute, nor exempted the defendant, for either reason, from liability thereon. In the instrument relied upon in this case, so far as the direction for cancellation in the event of death, and a command to his heirs to obey his wish and follow his orders, the language is no stronger than the indorsement upon the back of the note in the Dimon case. Nor is it as strong, because the language there used was a declaration that the note at death "becomes null and void." Here there is simply the expression of a wish to have it cancelled, and a direction to the heirs to obey the wish. Consequently the Dimon case becomes a direct and controlling authority in the disposition of this controversy. As there was no valid renunciation of right of the testator to enforce the note against the party, or of renunciation from liability upon the instrument, and as nothing contained in the declaration otherwise operates to relieve the defendant from liability, it follows that the note remains a valid and subsisting obligation.

The judgment enforcing it should therefore be affirmed, with costs. All concur.<sup>9</sup>

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<sup>9</sup> In *Baldwin v. Daly et al.*, 41 Wash. 416, it was held that the defendant Peter, in an action against him as surety on a note, could not show by parol evidence that the plaintiff had released him from liability on the note. After quoting § 122 of the Washington Negotiable Instruments Law [N. Y. § 203], Fullerton, J., on page 419, said: "This plainly provides that the renunciation of a debt must be in writing where the debt is evidenced by a negotiable instrument, and if 'renunciation' is used therein in the sense of 'release,' there can be no question that appellant must show a written renunciation in order to prove the allegations of his answer. Counsel for the appellant argues that the word is used in a sense different from that of release, and that while a renunciation must be by a writing, a release may be proved by parol. But we cannot think that the statute permits of this distinction. The words, 'The holder may expressly renounce his rights against any party to the instrument,' must refer to the release and discharge of a party from his obligation to pay it, else they can have no legitimate meaning."

Followed in *Pitt v. Little*, 108 Pac. (Wash.) 941, where it was held that the maker of a promissory note could not show by parol that the payee had released him from liability on the note. — C.

§ 204 LYNDONVILLE NATIONAL BANK *v.* FLETCHER.

68 VERMONT, 81. — 1895.

ACTION against a surety on a promissory note. Judgment for plaintiff.

ROWELL, J. — The defendant was surety for Walter on a second renewal note to the plaintiff bank. Walter had put \$20,000 of securities into the defendant's hands, in consideration of which he agreed to and did indorse for him to that amount, of which said note was a part. The bank knew that the defendant was surety, but did not know that he had security. Said note was taken up by a note that Walter sent to the bank, signed by him and purporting to be signed by the defendant, but on which he had forged the defendant's name. There were several like forged renewals, but the defendant had no knowledge of any of them till the bank notified him of the approaching maturity of the last one and informed him that it would not be renewed; whereupon he went to the bank, saw the note, pronounced his name thereon a forgery, and refused to pay it, and thereupon, at its maturity, this suit was brought thereon and on the three genuine notes and another of the forged renewals.

When the last genuine note was thus taken up, the bank stamped it "Paid," and sent it to Walter, who carried it to the defendant, who, when he saw it, was thereby induced to believe and did believe that it was paid and extinguished and he released therefrom; and thereupon, relying on that belief, he signed another note for Walter for the same amount, which otherwise he would not have done, and whereby he was damnified.

The defendant never had anything to do with the bank concerning any of the notes except as aforesaid, but the business was all done by Walter.

The defendant conceded that the bank believed the forged renewals were genuine, and acted upon that belief in taking them, and otherwise would not have taken them; but he claimed that the cashier was negligent in taking the first forged renewal and stamping and giving up as paid the last genuine renewal, for that the forgery was so manifest that, as a careful and prudent man, with both notes before him, he ought to have detected it; and he asked to go to the jury on that question, claiming that if the negligence was found, the plaintiff would be thereby estopped from recovery on the last genuine note.

The defendant also claimed that by stamping said last mentioned note "Paid" instead of "Renewed," as the fact was, the bank made a false statement, to its knowledge, and that when it sent the note to Walter thus stamped, it ought to have known that he would show it to the defendant, and that the defendant would be thereby induced to believe it was paid and extinguished, and to act accord-

ingly, to his prejudice, or, at least, that it ought to have known that such would naturally and probably be the fact, and that if the jury should find that the bank, in the exercise of the requisite care and prudence, ought to have so known, then what it did in this behalf amounted to a representation by it to the defendant that the note was in fact paid and extinguished; and if it was further found that the defendant acted upon that representation to his prejudice, the plaintiff would be estopped from recovery on that note.

The defendant further claimed, that if the parties are to be regarded as equally innocent in the matter, and the taking of the first forged renewal and the stamping and giving up as paid of the genuine renewal were a mere mistake on the part of the bank, then the loss must still rest upon the plaintiff, which made the mistake, and on which the chances of business have placed it.

But the court ruled against the defendant on all his claims, and directed a verdict for the plaintiff for the amount of the last genuine renewal, to which the defendant excepted; and he now makes substantially the same claim that he made below.

It was undoubtedly the duty of the bank to act in good faith towards the defendant in the matter, but it was under no further duty to him. (*Bank of Newbury v. Richards*, 35 Vt. 281, 284.) The presentation by Walter of the first forged renewal was a representation by him that it was genuine, and the bank, certainly with nothing to arouse its suspicion, owed the defendant no duty to distrust Walter and to examine the two notes to see whether his representation was true or not. No case is cited nor principle suggested requiring that. A bank is bound to know the signature of its depositor, and, therefore, if it pays a forged check purporting to be his, it must bear the loss. So the acceptor of a bill is bound to pay it although the drawer's name is forged, for the presentation of the bill is a direct appeal to him to accept it or to reject it. It is an inquiry as to its genuineness, addressed to the one who, of all others, is supposed to be best able to answer it, and whose answer is most satisfactory. He is, moreover, the person to whom the bill itself points as the legitimate source of information to others, and if he were permitted to dishonor the bill after he has once honored it, the very foundation of confidence in commercial paper would be shaken. But the drawee of a bill is not bound to know the signature of the payee, nor to examine and ascertain whether the indorsement is genuine; and if he pays on a forged indorsement, though to an innocent holder, he can recover the money. (*Corn Exchange Bank v. Nassau Bank*, 91 N. Y. 74; *Insurance Co. v. Bank*, 60 N. H. 442.) Nor is a *bona fide* indorsee, whether before or after acceptance, bound to inquire into the genuineness of a bill, in order to retain the money received by him from the drawee in payment thereof. (*Price v. Neale*, 3 Burr. 1354, a case that has never been departed

from.) So if a bank receives as genuine, fraudulently altered bills of its own, and passes them to the credit of a depositor who acts in good faith, it is bound by the credit thus given, for it was its duty to know its own bills. (*Bank of the United States v. Bank of Georgia*, 10 Wheat. 333.)

But the case at bar is unlike the case of a drawee who pays or accepts a forged bill, or of a bank that receives as genuine, forged notes purported to be its own, for here the bank was not bound to know the defendant's handwriting, and it was not its duty to examine with reference to ascertaining a thing that it was not bound to know. But by this we do not mean to say that it could shut its eyes that it might not see, or turn away lest otherwise facts might be disclosed at variance with what it represented to exist, for that would be bad faith and breach of its duty. It follows, therefore, that as here was no duty to examine, there was no negligence in not examining.

Nor was the representation of payment that the bank made, false to its knowledge, as claimed, but true in its belief, in substance and effect, for had the forged note been genuine it would, in law, have paid the other note and extinguished it as affording a cause of action against the defendant; and as knowledge of the falsity of the representation is not imputable to the bank, as it was not in a position that it ought to have known, there can be no estoppel on this score.

The case comes to this, then, that said representation was a mistake on the part of the bank, arising from its non-culpable ignorance of the truth, and brought about by the fraud of Walter; and it would seem that a representation induced by fraud will not estop. (Big. Estop., 3d. ed. 491.)

But it is claimed that if a mistake, the case is one that calls for the application of the rule that when a mistake has been made from which one of two innocent parties must suffer, he must suffer who made the mistake, especially when, as here, the chances of business have placed the loss upon him; and *The Gloucester Bank v. The Salem Bank* (17 Mass. 33) is cited in support of this proposition. That was a case in which the plaintiff had paid to the defendant, notes on which the name of its president had been forged, but which were otherwise genuine, and had neglected for fifteen days to return them; and the court stated the question to be, whether, as between the parties who were equally innocent and ignorant, the loss should remain on the plaintiff, where the chances of business had placed it, or be shifted back upon the defendant, which had, by good fortune, rid itself of it. It then went on to say, that in all such cases the just and sound principle of decision had been, that if the loss could be traced to the fault or neglect of either party, it should be fixed on him; but that generally, when no fault or negligence was imputable to either party, the loss had been suffered to remain where the course of business had placed it. But the first part of that

principle is not applicable here, for the loss is not traceable to the fault nor the neglect of the plaintiff. Nor is the second part any more applicable, for it can hardly be said that the chances of business have placed the loss on the plaintiff, but rather on the defendant, but if it can, the plaintiff, in legal effect, holds the defendant's note, and it has not been paid, and the plaintiff is not estopped from collecting it of him. In these circumstances, the chances of business can avail the defendant nothing.

Judgment affirmed.<sup>1</sup>

§ 204

McCORMICK v. SHEA.

[Reported herein at p. 626.]

3. ALTERATION.

§ 205 HORN AND LONG v. NEWTON CITY BANK.

32 KANSAS, 518. — 1884.

ACTION against makers of a promissory note. Judgment for plaintiff against both defendants.

The note was given by defendants to a named payee for the purchase price of a threshing machine which defendants intended to run as partners. Horn and the payee authorized the note to be changed so as to make one Hildreth the payee. Long did not know of or afterward consent to the change.

The opinion of the court was delivered by —

HORTON, C. J. — It is the contention of Long, one of the plaintiffs in error — a defendant below — that there had been a material alteration in the note sued on without his consent, thereby releasing him from all liability upon it. The note was originally drawn payable to "H. A. Pitts' Sons Manufacturing Company," and after having been given to that company it was altered by substituting the name of "O. B. Hildreth" for the original payee. This alteration was made without the knowledge or consent of Long, and he has never consented to or ratified the same. Within all the authorities, the substitution of O. B. Hildreth in the place of the original payee was a change of the personality of one of the parties to the note, and therefore a material alteration. (*Bank v. Hall*, 1 Halst. N. J. L. 215; *Stoddard v. Penniman*, 108 Mass. 366; *Draper v. Wood*, 112 Id. 315; 17 Am. Rep., pp. 92, 106; 2 Daniel on Neg. Inst., §§ 1387-1390.)<sup>2</sup>

<sup>1</sup> Accord: *Humboldt Bank v. Rossing*, 95 Iowa, 1. — H.

<sup>2</sup> See § 206, subsec. 4. — H.

If Horn and Long had been associated together in a trading partnership, then either member of the firm might have bound his co-partner by executing a promissory note in the name and on behalf of the firm, in any transaction pertaining to their partnership business. We suppose that under such circumstances, the material alteration of a note executed by the firm, with the knowledge and consent of one partner, would bind his co-partner, if the note had been given within the apparent scope of the business of the firm, as it is a general principle relating to trading partnerships that each partner is the lawful agent in the partnership in all matters within the scope of the business. (*Deitz v. Regnier*, 27 Kans. 94.)

A non-trading partnership, however, is controlled by rules differing from those controlling a commercial or trading one. (*Deitz v. Regnier*, *supra*.) Under the findings of the court, Horn and Long were partners only in the running of a threshing machine, and such a partnership is one of occupation or employment only. It is not a commercial or trading partnership. There was joint ownership between Horn and Long in the threshing machine, and there was a co-partnership between them in the matter of operating the machine, with the intention of dividing the profits and losses equally; but yet their business did not require the execution of negotiable paper as the proper, convenient, and usual mode of conducting it. In a partnership to operate a threshing machine there does not exist the implied power in the several members to make promissory notes, and thereby bind the firm. Whoever deals with an individual jointly interested with another in the operation of a threshing machine must, at his peril, inform himself of the nature of the partnership. The note in suit was signed by the makers in their individual names, and not as a firm. Therefore, upon the face of the note one of the makers had no right to bind the other without his consent to any material alteration. Horn had no authority to make a promissory note in the name of the firm or to bind Long, unless the latter had been previously consulted, and consented to the transaction. (*Lanier v. McCabe*, 2 Fla. 32; *Prince v. Crawford*, 50 Miss. 344; *Crossthwait v. Ross*, 1 Humph. [Tenn.] 23; *Smith v. Sloane*, 37 Wis. 285, 19 Am. Rep. 757; *Deardorf v. Thatcher*, 78 Mo. 128; 1 Daniel on Neg. Inst., §§ 355-358.) If he had not the authority to make promissory notes and draw bills of exchange and thereby bind the firm, he had no right to authorize a change of payee in the note executed by him and Long so as to bind Long thereby. The material alteration of a note with the consent of a maker is virtually making a new note and ante-dating it.

We therefore conclude that the material alteration of the note in question released Long. (*Broughton v. Fuller*, 9 Vt. 373.) That the bank purchased the note before maturity, for a valuable consideration, and is, therefore, a *bona fide* holder of the note, does not prevent



Long from asserting the material alteration of the note as a defense.<sup>3</sup> (*Wait v. Pomeroy*, 20 Mich. 425; *Benedict v. Cowden*, 49 N. Y. 396; *Bank v. Stowell*, 123 Mass. 196; 2 Daniel on Neg Inst., §§ 1410-1413.)

[Omitting a question of practice.]

The judgment against Long will be reversed and the cause remanded, with direction to the court below to render judgment in his favor upon the findings of fact.<sup>4</sup>

<sup>3</sup> "It is urged, however, that the plaintiff, being an innocent holder for value, can recover notwithstanding the alteration, because they propose to recover only the amount of the note as it was before the alteration. If such were the law forgeries by alteration would be protected by the law. The fraudulent payee would run no risk of loss because he would only have to transfer the note to an indorsee who might recover the original amount of the note by simply proving that he was innocent of the fraud. But the law is not so charitable to this class of persons." — *Gettysburg Nat. Bk. v. Chisolm*, 169 Pa. St. 564, 569; *Citizens Nat. Bk. v. Williams*, 174 Pa. St. 66 (doubting the correctness of *Kountz v. Kennedy*, 63 Pa. St. 187, *contra*).

There is some authority for the proposition that a banker after payment, has the right to hold an altered check for its correct amount as against the maker. *Hall v. Fuller*, 5 B. & C. 750; *Susquehanna Bk. v. Loomis*, 85 N. Y. 207; (cf. *Crawford v. West Side Bank*, 100 N. Y. 50, 57); *Redington v. Woods*, 45 Cal. 406. Compare Bills of Exchange Act, § 60, as to payment under forged indorsement.

Under § 205 the holder in due course of an instrument fraudulently altered is now permitted to enforce payment according to the original tenor. Prior to the statute this could not be done, though it seems to have been allowed in the exceptional case of *Worrall v. Ghenn*, 39 Pa. St. 388. Where the alteration is by a stranger, or, if by a party to the bill, is innocent, many American courts allow a recovery upon the original consideration. See cases following. — H.

<sup>4</sup> There may, of course, be a subsequent ratification of an unauthorized alteration. 2 Daniel on Neg. Inst., §§ 1401-1403; *Dickson v. Bamberger*, 107 Ala. 293; *Matlock v. Wheeler*, 29 Ore. 64. Blanks left in an instrument import a *prima facie* authority to the holder to fill them. Neg. Inst. L., § 33. But an alteration, although made in order to correct a mistake, and conform the written instrument to the actual intention of the parties, is fatal and destroys the validity of the instrument. *Newman v. King*, 54 Oh. St. 273, citing cases *contra*; *Evans v. Foreman*, 60 Mo. 449. [But see *Wallace v. Tice*, 32 Or. 283, *post*, p. 612, and *Osborn v. Hall*, 160 Ind. 153, in note 8, *post*, p. 614. — C.]

A restoration of the instrument to its original form will not revive liability upon it. *Citizens' Nat. Bank v. Richmond*, 121 Mass. 110; *Locknane v. Emmerson*, 11 Bush (Ky.) 69; *Fulmer v. Seitz*, 68 Pa. St. 237 (doubting *Kountze v. Kennedy*, 63 Pa. St. 187); *Citizens' N. B. v. Williams*, 174 Pa. St. 66; *McDaniel v. Whitsett*, 96 Tenn. 10.

**MATERIAL ALTERATION.** — As to what changes constitute a material alteration, see § 206; 2 Daniel on Neg. Inst., §§ 1373-1404; 2 Am. & Eng. Encyc. L. (2d ed.), pp. 222-248; *Ives v. Farmers' Bank*, 2 Allen (Mass.) 236.

**BURDEN OF PROOF.** — There is a hopeless conflict as to the presumption and burden of proof in the case of the apparent alteration of an instrument. One class of cases requires the one offering the paper to explain any apparent alteration. *Croswell v. Labree*, 81 Me. 44; *Simpson v. Stackhouse*, 9 Pa. St. 186;

## § 205

## SULLIVAN v. RUDISILL.

63 IOWA, 158. — 1884.

ACTION on a note and upon original indebtedness. After the note was given by defendant, with Fuller as surety, the plaintiff innocently procured W. A. R. to sign also as surety. The court held the note void, but allowed a recovery against defendant upon the original consideration. Action dismissed as to Fuller.

BECK, J. — This court has held that the signing of a promissory note by one as a joint maker, after the execution by the original maker, without his knowledge and consent, is a material alteration, which will defeat the instrument. (*Hamilton v. Hooper, et al.*, 46 Iowa, 515; *Dickerman v. Miner*, 43 Id. 508; *Hall's Adm'x v. McHenry*, 19 Id. 521.)<sup>5</sup>

It has also been ruled by this court that, when a promissory note has been innocently altered, without any fraudulent purpose, the payee may recover in an action brought upon the original consideration. (*Krause v. Meyer*, 32 Iowa, 566; *Clough v. Seay*, 49 Id. 111; *Morrison Bros. v. Huggins, et al.*, 53 Id. 76; *Eckert & Williams v. Pickel*, 59 Id. 545.)

Upon the facts found by the referee, which are not brought in question, and under the petition which sought to recover upon the original consideration, the Circuit Court rightly rendered judgment for plaintiff.<sup>6</sup>

*Gettysburg N. B. v. Chisolm*, 169 Pa. St. 564; *Elgin v. Hall*, 82 Va. 680; *Cole v. Hills*, 44 N. H. 227; *Gowdey v. Robbins*, 3 App. Div. (N. Y.) 353; *Evans v. Deming*, 20 Wkly. Dig. (N. Y.) 71.

Another and perhaps weightier class of cases raises no presumption against the paper but casts the burden upon the defendant to prove any alleged alterations. *Wilson v. Hayes*, 40 Minn. 531; *Wolferman v. Bell*, 6 Wash. 84; *Yakima N. B. v. Knipe*, 6 Wash. 348; *Hagan v. Merchants', etc. Ins. Co.*, 81 Iowa, 321; *Neil v. Case*, 25 Kans. 510; *Franklin v. Baker*, 48 Oh. St. 296; *Newman v. King*, 54 Oh. St. 273. See 2 Daniel on Neg. Inst. §§ 1417-1421; 2 Am. & Eng. Encyc. L. (2nd ed.), pp. 272-279. — H.

<sup>5</sup> Contra: *Mersman v. Werges*, 112 U. S. 139; *Royse v. State Bank* (Neb.), 69 N. W. 301; *Babcock v. Murray*, 58 Minn. 385. See, however, Neg. Inst. L., § 206, subsec. 4. — H.

<sup>6</sup> Accord (where alteration innocent): *Vogle v. Ripper*, 34 Ill. 100; *Owen v. Hall*, 70 Md. 97; *Booth v. Powers*, 56 N. Y. 22; *York v. Janes*, 43 N. J. L. 332; *Miller v. Stark*, 148 Pa. St. 164; *Gorden v. Robertson*, 48 Wis. 493; *Keene v. Weeks* (R. I.), 33 Atl. 446. A subsequent indorsee must be treated also as an assignee of this right of action upon the original consideration in order to maintain an action. *Burwell v. Orr*, 84 Ill. 465; *State Bank v. Shaffer*, 9 Neb. 1; *Port Huron First N. B. v. Carson*, 60 Mich. 432. If the instrument constitutes the only obligation, all remedies are lost by a material, though innocent, alteration. *Crawford v. West Side Bank*, 100 N. Y. 50; *Tate v. Fletcher*, 77 Ind. 102.

A fraudulent alteration extinguishes all remedies. *Smith v. Mace*, 44 N. H. 553; *Green v. Sneed*, 101 Ala. 205. Except, under Neg. Inst. L., § 205, as to subsequent holders in due course of negotiable instruments. See *ante*, p. 587, note. — H.

## § 205

## WALLACE v. TICE.

32 OREGON, 283. — 1898.

ON August 11, 1891, defendant Tice arranged with plaintiff for a loan, agreeing to give his note with one Herrall as security. Plaintiff wrote out the note, dating it "Aug. 11," and making it payable one year after date. Tice took it to Herrall the same day, signed it, procured Herrall's signature, and returned to plaintiff with the note the following day. Before delivering her check for the money, plaintiff changed the date in his presence from "11" to "12." Plaintiff testified that she made the change to correspond with the agreement of the parties, and Tice testified, in substance, that plaintiff made the change without objections from him.

In an action on the note against Tice and against the administrator of Herrall, deceased, judgment was rendered for plaintiff, and the administrator appealed.

WOLVERTON, J. — This is a suit to restore the original conditions of a promissory note which it is alleged were changed by the payee, under mistake and misapprehension of the rights and agreements of the parties, and to recover thereon against the makers.

Three questions remain for solution: (1) Has a court of equity jurisdiction of the cause, as it remains dismembered of the alleged trust relations? (2) Can a recovery be had upon the altered note? And (3) is the name "Geo. Herrall," appended to said note, his genuine signature? <sup>7</sup>

It may be conceded that the alteration made is material, and upon this premise we will determine the legal effect thereof. The rule may be said to be settled that a material alteration made fraudulently, and with vicious intent, by the party claiming a benefit under it, will avoid the note, and extinguish the liability, and henceforth no recovery can be had. *Vogle v. Ripper*, 34 Ill. 100. There is a strong current of authority, however, which holds to the doctrine that while an alteration, though material and unauthorized, which was innocently and honestly made, and without any fraudulent or improper motive, avoids the note, nevertheless an action will lie upon the original indebtedness if it is independent of the note, and has not been discharged by its execution. (*Booth v. Powers*, 56 N. Y. 22, 30, 31; *Lewis v. Schenck*, 18 N. J. Eq. 459; *Bank v. Shaffer*, 9 Neb. 1; *Hunt v. Gray*, 35 N. J. Law, 227; *Vogle v. Ripper*, *supra*.) And many authorities permit the action to be maintained upon the note itself. (*Horst v. Wagner*, 43 Iowa, 373; 2 Pars. Notes & B. 570; *Duker v. Franz*, 7 Bush, 273; *Adams v. Frye*, 3 Metc. (Mass.) 103; *Smith v. Dunham*, 8 Pick. 246; *Milbery v. Storer*, 75 Me. 69; *Croswell v. Labree*, 81 Me. 44; *Rogers v. Shaw*, 59 Cal. 260; *Murray v. Graham*, 29 Iowa, 520; *McRaven v. Crisler*, 53

<sup>7</sup> The portion of the opinion relating to the third question is omitted. — C.

Miss. 542; *Footte v. Hambrick*, 70 Miss. 157.) It was early held in *Bowers v. Jewell*, (2 N. H. 545,) that "it is reasonable and just to permit a party to show that the alteration was by consent of those interested, was by accident, or under circumstances rebutting every presumption of improper motives." In *Lewis v. Schenck*, *supra*, the agent of the payee altered the note soon after its execution, in the absence of the makers, by inserting the words "with interest from date," honestly believing that he could legally make the change to correspond with what he supposed to be the real agreement of the parties, entered into prior to the execution of the note; and it was held that the alteration was under a mistake of fact, and the plaintiff was permitted to recover. In *Croswell v. Labree*, *supra*, the words "or bearer" were inserted by the payee after delivery, and without the knowledge or consent of the maker. It was ruled by the lower court that if the alteration was made innocently, without any fraudulent or improper motives, it would not avoid the note, and the ruling was sustained by the Supreme Court. And in *Duker v. Franz*, *supra*, the change was from "1868" to "1869," by making a "9" over the "8," and it was held that it did not destroy the legal efficacy of the note.

We think the following deduction is within the cases: That where the alteration is prompted by honest and pure motives, with a purpose of correcting the instrument to correspond with what the party honestly and in perfect good faith believed to be the true engagement of the parties at the time of the execution, the act does not destroy the legal efficacy of the note, and recovery may be had upon it when restored. See *Rogers v. Shaw*, *supra*; *Kountz v. Kennedy*, 63 Pa. St. 187, and *Horst v. Wagner*, *supra*. We come the more readily to this conclusion in view of our statute, which makes it incumbent upon the party producing a writing appearing to have been altered after its execution, in a part material to the question in dispute, to account for the alteration before he will be permitted to give it in evidence. He may explain the alteration by showing that it was made by another without his concurrence, or was made with the consent of the parties affected by it, or otherwise properly or innocently made. (Hill's Ann. Laws Or. § 788.)

Now, it is perfectly apparent that Mrs. Wallace was not impelled by any fraudulent motive in making the change in the date of the note sued upon. It is also just as apparent that she was acting under an honest misapprehension of her right to make the change to correspond with what she supposed to be the agreement with Tice and Herrall to loan them \$2,000 for one year, and that, in order to make the contract conform to what she understood the agreement to be — that is, to loan the money for a full year — she made the change, intending it for the benefit of the makers. It was of no benefit to her, but, on the contrary, operated as a real detriment; of small proportions it may be, but it was actual and patent. If it were adjudged that for such

an act, prompted solely by the purest motives, yet involving a misapprehension of the right and authority to do the act, the suitor should be turned away remediless, the result would be an obvious and palpable failure of justice in a great majority if not in every instance.

The remaining question, touching the jurisdiction of a court of equity to entertain the suit, is not entirely free from doubt. But as the act which it is claimed avoids the instrument was done under mistake and misapprehension, and the suit involves a discovery which is in some degree necessary to show the agreement and the mistake, the jurisdiction ought to be sustained. Such is the exact ruling of *Lewis v. Schenck*, *supra*. See, also, *Nickerson v. Swett*, 135 Mass. 514. The decree of the court below will therefore be affirmed.<sup>8</sup>

## § 205 MCKEEHAN, THE NEGOTIABLE INSTRUMENTS LAW.

[41 AM. LAW REG., N. S., pp. 580-582.]

THE criticism of this section [N. Y., § 205]<sup>9</sup> is contained in a note published subsequent to the articles in the Harvard Law Review and is based upon the case of *Jeffrey v. Rosenfeld*,<sup>1</sup> decided by the Supreme Court of Massachusetts in September, 1901.

<sup>8</sup> "We concede and affirm as a legal proposition that the payee or holder of a promissory note has no right or authority, without the consent of the maker or makers thereof, to make any material alteration of the note for the purpose of correcting any mistake that may have been made in the execution thereof, unless it is shown that the alteration or change is made to correct the note so as to make it conform to what all of the parties thereto agreed or intended it should have been. An alteration for such purpose and to such extent the great weight of authorities sanction, and hold that it may be made without destroying the legal effect of the note or instrument." *Jordan, J.*, in *Osborn v. Hall*, 160 Ind. 153, 159, where recovery was allowed on the note itself.

Contra, *Merritt v. Dewey*, 218 Ill. 599, where Scott, J., at p. 605, said: "One party to a written instrument which does not speak the actual contract of the parties does not have the right to alter the instrument to make it accord therewith. If the right to so make such an alteration existed, the jurisdiction and power of a court of chancery to reform written contracts which inaccurately state the undertakings of the parties would be entirely useless." — C.

<sup>9</sup> Section 64 of the English Bills of Exchange Act reads:

"Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided, except as against a party who has himself made, authorized, or assented to the alteration, and subsequent indorsers.

"Provided, that where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenour."

<sup>1</sup> 179 Mass. 506.

At the common law, the material alteration of a negotiable instrument without the assent of all parties liable thereon avoided the instrument except as against a party who made, authorized or assented to the alteration, and subsequent indorsers. The rule applied to an alteration made by a stranger as well as to an alteration made by a party to the instrument. Section 64 of the English act perpetuates the common law rule with the exception of a proviso inserted for the benefit of a holder in due course, under which he may enforce, according to its original tenor, a bill which has been materially altered, if the alteration is not apparent. The proviso, however, does not concern us in this discussion.

The American courts early changed the common law rule to the extent of holding that an alteration made by a *stranger* was a mere spoliation or trespass, and that the holder could still enforce the instrument in its original form. Now section 124 of the American act is practically the same as section 64 of the English act. Therefore, says Professor Ames, we are in this dilemma: "Either the English and American sections, although expressed in the same terms, must be interpreted differently, or else the American law is changed, and, as it seems to the writer, for the worse. To avoid the second horn of the dilemma involves great straining, not to say perversion, of simple English words."

How one can see any ambiguity in section 124 [N. Y., § 205] is a mystery. It reads: "When a negotiable instrument is materially altered \* \* \* it is avoided," etc. An alteration made by a stranger is not excepted, and certainly it is none the less an alteration because made by a stranger. To say that such an alteration is not covered by section 124 would be, as Professor Ames says, "a great straining, not to say perversion, of simple English words." Judge Brewster agrees with the critic on this point. The only person who has ever suggested a doubt as to the meaning of this section is Mr. Justice Morton, who wrote the opinion in *Jeffrey v. Rosenfeld, supra*. In that case, a note secured by a mortgage was altered, though by whom did not appear. On a bill in equity to restrain the foreclosure of the mortgage, the court sustained the holder's right to foreclose without interpreting section 124 of the code, though Justice Morton, in an *obiter dictum* of some length, remarked that the question of its interpretation was one that deserved serious consideration. After referring to the authorities in this country which decided that a material alteration made by a stranger will not avoid the instrument, he adds: "It would seem not unreasonable to suppose that it was the intention of the framers of the American act that section 124 should be construed according to the law of this country rather than that of England." As a generality, that remark is profoundly true and applies to all the sections of the new act. They should be construed according to American law rather than English law. As applicable to the particular point under dis-

cussion, however, the remark is of small value. If the language of section 124 is clear and unmistakable, it should be given its plain meaning. To construe it according to American law does not mean to knock it down simply because it changes American law somewhat. The learned judge points out no ambiguity in the language of this section. His sole reason for doubting its very plain meaning is that it changes the law. As a matter of fact, we learn from Judge Brewster that it was intended to change the law; that Mr. Crawford reported to the conference in 1896 in favor of adopting the common law rule as to alterations by a stranger, in order that the law of the two countries might be uniform on this important point, and in order that the benefit of written evidence might be preserved. This view was approved by the conference, and section 124 was inserted to restore the English rule.

Professor Ames thinks that the change is for the worse, though he vouchsafes no reasons. Under such circumstances, the profession cannot be blamed for accepting without question the judgment of the learned and experienced experts who drafted the new act. But at all events there is no ambiguity in this section. Its meaning is unmistakable.

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## § 205 NATIONAL EXCHANGE BANK *v.* LESTER.

194 NEW YORK, 461. — 1909.

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered May 16, 1907, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

The defendant was sued as the accommodation indorser upon a note for \$375 made by one Frank L. Fancher and acquired by the plaintiff bank before maturity in the regular course of its business.

The defense was that the note as originally made and indorsed was for \$75 only; that the maker thereafter, without the knowledge or consent of the indorser, altered the note by inserting in the body thereof the words "Three hundred" immediately in front of the words "Seventy-five" and the figure "3" immediately in front of the figures "75," thereby making the instrument apparently a note for \$375 instead of \$75; and that the maker thereafter caused the note as thus altered to be discounted by the plaintiff bank. The answer prayed judgment that the complaint be dismissed except as to the amount of the note before alteration, together with interest and protest fees, to wit, \$78.66. The defendant also served an offer to allow the plaintiff to take judgment for that amount.

Upon the trial the court charged the jury that if the note indorsed by the defendant was in fact a note for \$375 on its face, the plaintiff was entitled to recover that amount and interest.

The trial judge further charged the jury that if they found that there were spaces upon the note "so carelessly and negligently left by this indorser, Mr. Lester, that a person having custody of the note might run in a figure 3 and the words 'Three hundred' so as not to occasion in the mind of the indorser [evidently meaning *indorsee*] any inquiry into its validity," they might find that the indorser conducted himself carelessly and negligently in the premises and thus invited the liability which the face of the note called for when presented to the bank.

The defendant duly excepted to that part of the charge to the effect that if the defendant was negligent in leaving blank spaces, the jury must find a verdict for the plaintiff for the full amount of the note as it stood. The court then reiterated the proposition, saying that "if the jury find that the defendant was careless and negligent in leaving vacant spaces for the words and figures, such carelessness and negligence on his part would still make him liable for the note;" and to this the defendant also excepted.

The jury found for the plaintiff in the sum of \$375, with interest. The judgment entered upon the verdict has been unanimously affirmed by the Appellate Division.

WILLARD BARTLETT, J. — As this case went to the jury, they might well have found that the note in suit was a note for only seventy-five dollars when originally prepared by the maker and indorsed at his instance by the defendant, and that it had subsequently been altered to a note for three hundred and seventy-five dollars when discounted by the plaintiff bank. They were instructed in substance, however, that the indorser was liable for the amount of the note as raised by the alteration, if he had been careless and negligent in placing his name upon the instrument while there were spaces thereon which permitted the insertion of the words and figure whereby it was transmuted from a note for seventy-five dollars into a note for three hundred and seventy-five dollars. Conceding that the contract which he actually signed bound him only to pay the smaller amount, the jury were permitted to find that in consequence of his negligence in the respect indicated it had become a contract which bound him to pay the larger amount to a subsequent innocent holder of the paper.

In support of the correctness of this ruling, the learned counsel for the respondent asserts the doctrine that "a party to a note who puts his name to it in any capacity of liability, when it contains blanks uncanceled facilitating an alteration raising the amount, is liable for the face of the note as raised to an innocent holder for value;" and he declares that this doctrine has been approved and apparently adopted in Alabama, California, Colorado, Illinois, Kansas, Kentucky, Louisiana, Michigan, Missouri, Nebraska and Pennsylvania.

In considering his proposition, it is important to bear in mind a radical distinction which exists between two classes of notes to which



the adjudicated cases relate: (1) Those notes in which obvious blanks are left at the time when they are made or indorsed, of such a character as manifestly to indicate that the instruments are incomplete until such blanks shall be filled up; and (2) those notes which are apparently complete, and which can be regarded as containing blanks only because the written matter does not so fully occupy the entire paper as to preclude the insertion of additional words or figures or both. It is a note of the latter class that we have to deal with here. One who signs or indorses a note of the first class has been held liable to *bona fide* holders thereof, in some of the cases cited by the respondent, according to the terms of the note after the blanks have been filled, on the doctrine of *implied authority*, while in other cases, relating to notes of the second class, the liability of the maker or indorser for the amount of the note as increased by filling up the unoccupied spaces therein, is placed upon the doctrine of *negligence* or *estoppel by negligence*.

The cases cited by respondent in which parties to commercial paper executed by them while obvious blanks remained unfilled thereon have been held liable upon the instrument as completed by filling out such blanks on the ground of implied authority, require no further consideration here, as there is no suggestion that there was any blank of this character upon the note in suit. These cases are *Winter & Loeb v. Pool* (104 Ala. 580; ) *Statton v. Stone* (61 Pac. Rep. 481, Colorado); *Cason v. Grant Co. Deposit Bank* (97 Ky. 487), and *Weidman v. Symes* (120 Mich. 657). There were obvious blanks also in the notes under consideration in *Visher v. Webster* (8 Cal. 109) and *Lowden v. S. C. Nat. Bank* (38 Kan. 533), and the decision in each of these cases appears to have proceeded upon the doctrine of implied authority rather than negligence.

It must frankly be conceded, however, that the respondent finds support for the doctrine which it asserts in the case at bar in the decisions of Pennsylvania, Illinois and Missouri, so far as the maker of commercial paper is concerned, and in those of Kentucky and Louisiana, in respect to the liability of a party who has indorsed or become surety on a note in which there were spaces (not obvious blanks) that permitted fraudulent insertions enlarging the amount. (*Garrard v. Haddan*, 67 Pa. St. 82; *Yocum v. Smith*, 63 Ill. 321; *Scotland Co. Nat. Bank v. O'Connel*, 23 Mo. App. 165; *Hackett v. First Nat. Bank of Louisville*, 114 Ky. 193; *Isnard v. Torres & Marquez*, 10 La. Ann. 103.)

In *Garrard v. Haddan* (*supra*) a space was left between the words "one hundred" and the word "dollars" in which "fifty" had been inserted after the maker had signed and delivered it; and the court held the maker answerable to a *bona fide* holder for the full face of the note as altered on the ground of the negligence of the maker in leaving the space in the note which was thus filled up after execution.

"We think this rule is necessary," said Chief Justice Thompson, "to facilitate the circulation of commercial paper and at the same time increase the care of drawers and acceptors of such paper, and also of bankers, brokers and others in taking it." It is a little difficult to see how the rule tends to make *bona fide* purchasers more careful, as this last observation suggests.

The case of *Yocum v. Smith* (*supra*) held the maker liable upon a note which had been raised after execution from one hundred dollars to one hundred and twenty dollars, the words "and twenty" having been inserted in a space left between the word "hundred" and the word "dollars." The court said that the maker had acted with unpardonable negligence in signing the note and leaving a blank which could so easily be filled; that he had thus placed it in the power of another to do an injury and that he must, therefore, suffer the resulting loss. This decision undoubtedly sustains the position of the respondent, although there was another element of negligence in that case which is not present here. It appeared that the maker there was informed by letter by the purchaser, very soon after the date of the note, that he had bought it and of its date and amount; yet he made no objection as to the amount until nearly a year later.

In *Scotland Co. Nat. Bank v. O'Connel* (*supra*) the defendants executed and delivered a note for \$100 to one Smith, the body of which was in his handwriting, in a condition which enabled him to add the words "thirty-five" after "one hundred" in the written part and put the figures "\$135" at the head of the note in the space where the amount is usually indicated by figures. The St. Louis Court of Appeals held that the defendants were liable for \$135 because they had delivered the note to Smith, who was their co-worker, "in such a condition as to enable him to fill blank spaces without in any manner changing the appearance of the note as a genuine instrument."

The cases thus far discussed were all of them actions against the makers of the raised paper. The same rule, however, was applied against an indorser in *Isnard v. Torres & Marquez* (*supra*) by the Supreme Court of Louisiana under the following circumstances: Marquez indorsed a note for \$150 for the accommodation of Torres. The amount was raised to \$1,150 and purchased by the plaintiff in good faith as a note for that sum. The report states that there was testimony of experienced persons to the effect that if at the time of the indorsement the word *onze* (for *eleven*, the note being in French) and the additional figure before 150 were not there "the note would have exhibited blanks which at least with regard to the written part were unusual and calculated to attract attention and would have rendered the note unsalable in the market." In this opinion, upon inspection of the note, the court expressed its full concurrence. The indorser was held liable for the amount of the note as raised on the ground that he had not exercised the proper caution. To the same

effect is *Hackett v. First Nat. Bank of Louisville (supra)*, where it was held that a surety who had signed a note in which were written the words "five hundred" with spaces before and after them, which the maker had filled up by writing "twenty" before and "fifty" after them, thereby making a note for \$2,550, was liable thereon to a purchaser in good faith. In this case the attention of the Kentucky Court of Appeals was called to the fact that the great weight of authority was the other way, but in view of the fact that the rule had been so established in Kentucky for a quarter of a century the court determined to adhere to it, in observance of the principle of *stare decisis*.

This court is not thus constrained. The question involved in the present appeal has not been authoritatively decided in this state and we are at liberty to adopt that view of the law which seems to us most consonant with sound reason and best supported by well considered adjudications in other jurisdictions.

The outcome of these adjudications is accurately set forth, as it seems to me, by Mr. Randolph in his treatise on the Law of Commercial Paper as follows:

"Where negotiable paper has been executed with the amount blank, it is no defense against a *bona fide* holder for value for the maker to show that his authority has been exceeded in filling such blank, and a greater amount written than was intended. This was also once held to be the rule where no blank had been actually left, but the maker had negligently left a space either before or after the written amount, which made it easier for a holder fraudulently to enlarge the sum first written. It has now, however, become in America an established rule that if the instrument was complete without blanks at the time of its delivery, the fraudulent increase of the amount by taking advantage of a space left without such intention \* \* \* will constitute a material alteration and operate to discharge the maker." (1 Randolph on Commercial Paper, § 187.)

The rule thus stated is sustained by the decisions of the courts of last resort in Massachusetts, Michigan, New Hampshire, Iowa, Maryland, Mississippi, Arkansas and South Dakota. In my judgment it rests on a sounder basis than the opposite doctrine and accords better with such adjudications of this court as bear more or less directly on the question involved.

The leading case sustaining this view is *Greenfield Savings Bank v. Stowell* (123 Mass. 196), in which the opinion was written by Chief Justice Gray, afterward an Associate Justice of the Supreme Court of the United States. The discussion is careful and exhaustive, reviewing all the important cases in England and America bearing upon the subject which had been decided up to that time (1877), including that of the Supreme Court of Pennsylvania in *Garrard v. Haddan (supra)*, which was the principal authority the other way. I shall not undertake to review the same authorities here or paraphrase the opinion of

Chief Justice Gray, which deals with them in such a manner as fully to justify his rejection of the doctrine that the makers of a promissory note apparently complete when they sign it are liable for an amount to which it may subsequently be raised, without their knowledge or consent on the ground that they were negligent in permitting spaces to remain thereon in which the figures and words which effected the increase could be inserted. In support of his conclusion, however, he quotes some passages from the opinion of Christianity, J., in *Holmes v. Trumper* (22 Mich. 427) which will bear repetition as suggestive of some of the reasons why the forgery of a promissory note should not be held to create a contract, which the party sought to be charged never consciously made himself or authorized anybody else to make in his behalf. Speaking of the alleged negligence in leaving spaces on the note, Mr. Justice Christianity said: "The negligence, if such it can be called, is of the same kind as might be claimed if any man, in signing a contract, were to place his name far enough below the instrument to permit another line to be written above his name in apparent harmony with the rest of the instrument; \* \* \* Whenever a party in good faith signs a complete promissory note, however awkwardly drawn, he should, we think, be equally protected from its alteration by forgery in whatever mode it may be accomplished; and unless, perhaps, when it has been committed by some one in whom he has authorized others to place confidence as acting for him, he has quite as good a right to rest upon the presumption that it will not be criminally altered, as any person has to take the paper on the presumption that it has not been; and the parties taking such paper must be considered as taking it upon their own risk, so far as the question of forgery is concerned, and as trusting to the character and credit of those from whom they receive it, and of the intermediate holders."

While a general reference to the cases cited and reviewed by Chief Justice Gray in *Greenfield Savings Bank v. Stowell* (*supra*) will suffice, there are some later decisions to which attention may be called. In *Knorville Nat. Bank v. Clark* (51 Iowa, 264) will be found a strong and well-reasoned opinion against holding a party to a note which has been fraudulently raised, after it left his hands, liable for negligence, because when he executed the instrument there were spaces left thereon (not being obvious blanks designed to be filled) which would permit of forgery. The trial court had rendered judgment against the maker for the amount of the note as raised from \$10 to \$110 on a finding of negligence in leaving a space before the word "ten" and the figures "10." "On this ground," said the Supreme Court of Iowa, "the court proceeded and the decision is based on the reasoning of the civil lawyers. But could it be anticipated that such negligence would cause another to commit a crime, and can it be said a person is negligent who does not anticipate and provide against the

thousand ways through or by which crime is committed? Is it not requiring of the ordinary business man more diligence than can be maintained on principle, or is practicable, if he is required to protect and guard his business transactions so that he cannot be held liable for the criminal acts of another. If so, why should not the negligence of the owner of goods which are stolen excuse the *bona fide* purchaser?" And referring to the argument that such a measure of liability is required to promote the free interchange of commercial paper (a view which seems to have been influential in the Pennsylvania case of *Garrard v. Haddan*) the court well said: "At the present day negotiable paper is not ordinarily freely received from unknown persons. Forgeries, however, are not confined to such. But the necessities of trade and commerce do not require the law to be so construed as to compel a person to perform a contract he never made and which it is proposed to fasten on him because some one has committed a forgery or other crime."

In *Burrows v. Klunk* (70 Md. 451) the Maryland Court of Appeals emphasizes the distinction between a note in blank as to the amount, when signed and delivered to another for use, and a note complete on its face when signed and delivered, in which has been written the sum payable, the date, time of payment and name of the payee. "In such case," it is held, "there can be no inference that the defendant authorized any one to increase the amount, simply because blank spaces were left in which there was room enough to insert a larger sum."

No one questions the proposition that where a party to commercial paper intrusts it to another with a blank thereon designed to be filled up with the amount such party is liable to a *bona fide* holder of the instrument for the amount filled in, though it be larger than was stipulated with the person to whom immediate delivery was made. (*Van Duzer v. Howe*, 21 N. Y. 531.) So, also, a note executed with a blank therein for a statement of the place of payment is not avoided in the hands of a *bona fide* holder for value by the insertion in the blank of a place different from that agreed upon by the original parties. (*Redlich v. Doll*, 54 N. Y. 234.) But where there is no blank for that purpose when the note is indorsed, the insertion of an obligation to pay interest is a material alteration which invalidates the instrument as against the indorser. (*McGrath v. Clark*, 56 N. Y. 34.) In the case last cited the note when indorsed ended with the word "at," followed by a space in which the maker, after indorsement, inserted a place of payment, adding the words "with interest;" but no suggestion appears to have been made that because the space left was large enough to allow the insertion of these words, the indorser was negligent and could be charged with the amount of the note, including the interest, on that ground. On the contrary, as the law then stood, he was relieved of all liability whatever as the effect of the unauthorized alteration. Now, however, under the Negotiable Instruments Law

(§ 205) he would be liable on the paper according to its original tenor.

To sustain the judgment in the case at bar in view of the instructions under which the issues were submitted to the jury, we must hold that the indorser of a promissory note, the amount of which has been fraudulently raised after indorsement, by means of a forgery, is liable upon the instrument in the hands of a *bona fide* holder, for the increased amount, because of negligence in indorsing the same when there were spaces thereon which rendered the forgery easy, though the note was complete in form. To do this would be to create a contract through the agency of negligence; for the action is not in tort for damages, but upon the contract as expressed in the note. But apart from any question as to the form in which the indorser is sought to be charged, I am of opinion that no liability on the part of the indorser for the amount of such a note as raised can be predicated simply upon the fact that such spaces existed thereon. This conclusion I base upon the authorities to that effect which I have already discussed and upon what seem to me to be considerations of sound reason independent of judicial authority. An averment of negligence necessarily imports the existence of a duty. What duty to subsequent holders of a promissory note is imposed by the law upon a person who is requested to indorse the paper for the accommodation of the maker and who complies with such request? It is a complete instrument in all respects — as to date, name of payee, time and place of payment and amount. There are, it is true, spaces on the face of the instrument in which it is possible to insert words and figures which will enlarge the amount and still leave the note apparently a genuine instrument — in other words, there is room for forgery. On what theory is the indorser negligent because he places his name on the paper without first seeing to it that these spaces are so occupied by cross lines or otherwise as to render forgery less feasible? It can only be on the theory that he is bound to assume that those to whom he delivers the paper or into whose hands it may come will be likely to commit a crime if it is comparatively easy to do so. I deny that there is any such presumption in the law. It would be a stigma and reflection upon the character of the mercantile community and constitute an intolerable reproach of which they might well complain as without justification in practical experience or the conduct of business. That there are miscreants who will forge commercial paper by raising the amount originally stated in the instrument is too true and is evidenced by the cases in the law reports to which we have had occasion to refer; but that such misconduct is the rule, or is so general as to justify the presumption that it is to be expected and that business men must govern themselves accordingly, has never yet been asserted in this state, and I am not willing to sanction any such proposition either directly or by implication. On

the contrary, the presumption is that men will do right rather than wrong. (See *Bradish v. Bliss*, 35 Vt. 326.) As was said by Judge Cullen in *Critten v. Chemical Nat. Bank*, (171 N. Y. 219, 224), it is not the law that the drawer of a check is bound so to prepare it that nobody else can successfully tamper with it. Neither is it the law that the indorser of a promissory note complete on its face may be made liable for the consequences of a forgery thereof simply because there were spaces thereon which rendered the forgery easier than would otherwise have been the case.

I think the judgment of the Appellate Division should be reversed and a new trial granted, with costs to abide the event.

CULLEN, Ch. J., GRAY, HAIGHT, WERNER, HISCOCK and CHASE, JJ., concur.

Judgment reversed, etc.<sup>2</sup>

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## § 205

### NOLL v. SMITH.

64 INDIANA, 511. — 1878.

ACTION against maker by indorsee. Defense, that the notes had when executed a condition annexed that they were not to be paid unless defendant sold machines equal to the amount of the notes, and that the notes had been altered by cutting off the portion containing the condition. Judgment for plaintiff.

NIBLACK, J. [After stating the facts.] — We understand the general rule to be that the removal or detachment of a material condition annexed to, or forming a part of, a negotiable note, without the knowledge or consent of the maker, will ordinarily be a sufficient defence to such note, even in the hands of an innocent holder, and especially when such removal or detachment is made under circumstances which put the purchaser of the note fairly upon his inquiry as to the altered condition of the note, and this we construed to be the doctrine of the case of *Cochran v. Nebeker* (48 Ind. 459), cited and discussed by the appellant; but that, when the note and condition are negligently so executed by the maker that the condition may easily be removed, without in any manner mutilating or defacing the note, and the note is thus, without objection, put in circulation in that form, the maker cannot be heard to deny his liability to pay the note in the hands of an innocent holder, notwithstanding the condition may have been detached from it before such innocent holder became the owner of it. Such was, in substance, the decision of this court in the case of *Cornell v. Nebeker* (58 Ind. 425). See, also *Woolen v. Ulrich* (64 Ind. 120), approving and following that case.

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<sup>2</sup> This case is reported with notes in 21 L. N. S. 402, and in 16 A. & E. Ann. Cas. 770. — C.

Upon the authority of these last named cases, the judgment in his case will have to be affirmed.

The judgment is affirmed, with costs.<sup>3</sup>

§ 205 BROWN v. REED, 79 Pa. St. 370. — 1875. The original instrument was as follows:

NORTH EAST April, 3d, 1872.

Six months after date I promise to pay to J. B. Smith or bearer fifty dollars when I sell by order Two HUNDRED AND FIFTY DOLLARS worth of Hay and Harvest Grinders, for value received, with legal interest, without appeal, and also without defalcation or stay of execution

T. H. BROWN. Agent for Hay and Harvest Grinders.

<sup>3</sup> Such an alteration is material and will prevent recovery by *bona fide* holders. *Scofield v. Ford*, 56 Iowa, 370; *Wait v. Pomeroy*, 20 Mich, 425; *Benedict v. Cowden*, 49 N. Y. 396; *Gerrish v. Glines*, 56 N. H. 9; *Stephens v. Davis*, 85 Tenn. 271. Negligence of the maker may, however, estop him from setting up the alteration. *Harvey v. Smith*, 55 Ill. 224; *Seibel v. Vaughan*, 69 Ill. 257; *Phelan v. Moss*, 67 Pa. St. 59; *Zimmerman v. Rote*, 85 Pa. St. 188. — H.

[Under § 205 of the Negotiable Instruments Law, the holder in due course is, of course, permitted to recover on the instrument "according to its original tenor." See *Bothell v. Schweitzer*, 120 N. W. (Neb.) 1129. A note to this case in 22 L. N. S. 263, says in part: "Prior to the adoption of the uniform Negotiable Instruments Law, which permits a *bona fide* holder not a party to the alteration of the instrument to recover according to its original tenor, it seems that the detachment of a paper originally attached to a bill or note, and modifying the terms thereof, either had the effect to render the instrument void, even in the hands of a subsequent *bona fide* holder, and prevent any recovery thereon, or to entitle such a *bona fide* holder to recover according to the tenor of the bill or note, and without reference to the conditions in the detached paper. In other words, the courts did not adopt the middle ground contemplated by the provision of the Negotiable Instruments Law already referred to. In some of the cases holding that there could be no recovery at all, for the reason that the detachment of the paper constituted a material alteration avoiding the bill or note even in the hands of a *bona fide* holder, the conditions contained in the detached paper would themselves have prevented a recovery, so that the result was the same as if the court had been of the opinion that the *bona fide* holder took the instrument subject to the conditions in the detached paper. This fact, however, can scarcely limit the effect of the express language putting the decisions on the other ground. A reference to the case note to *National Exch. Bank v. Lester*, 21 L. R. A. (N. S.) 402, as to the duty of the indorser, maker, or surety of the commercial paper to see that spaces are filled so as to prevent raising, discloses the same tendency on the part of the courts, prior to the adoption of the Negotiable Instruments Law, either to permit a recovery according to the tenor of the instrument as altered, or to deny a recovery even according to the original tenor. There is some conflict among the courts as to the effect of the removal of such a paper upon the rights of a subsequent *bona fide* holder, some holding that it vitiates the instrument even in the hands of a *bona fide* holder, while others allow a recovery. Doubtless the facts with respect to negligence will dissipate some, though not all, of the apparent conflict among the cases on this point." See also the note on "Instruments so executed that a portion thereof may be detached or altered," in 11 Am. St. Rep. 317. — C.]



The instrument offered in evidence was the left hand portion of the above, which bore the indorsement "J. B. Smith." The paper had been cut in two without Brown's knowledge. Plaintiff was a holder in due course of the negotiable portion. Defendant offered to prove the alteration, and the offer was rejected.

*Held*: "Whether there was negligence in the maker was clearly a question of fact for the jury. The line of demarcation between the two parts might have been so clear and distinct and given the instrument so unusual an appearance as ought to have arrested the attention of any prudent man. But it may have been otherwise. If there was no negligence in the maker, the good faith and absence of negligence on the part of the holder cannot avail him. The alteration was a forgery, and there was nothing to estop the maker from alleging and proving it. \* \* \* We think then that the evidence offered by the defendant below should have been received."<sup>4</sup>

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## II. Discharge of party secondarily liable.

### § 201

### MCCORMICK v. SHEA.

50 MISCELLANEOUS (N. Y. SUP. CT., APP. T.) 592.—1906.

APPEAL by the plaintiff from a judgment for the defendant and also from an order denying plaintiff's motion for a new trial.

GILDERSLEEVE, J. — The action is on a promissory note against the defendant, Thomas J. Shea, as maker, and defendant, Annie A. Shea, as indorser. Said Thomas J. Shea, the maker, does not defend the action. There is a very sharp conflict of evidence as to the facts, and the jury found for the defendant. Plaintiff appeals. It is conceded that, before maturity, the indorsement of said Annie A. Shea was canceled. This was done by a representative of defendant's attorney who scratched out the indorser's name in the presence of plaintiff. The parties were negotiating with respect to claims of each against the other, and it is the contention of defendant that as a part of a compromise plaintiff consented to the cancellation of said indorsement. Plaintiff, on the other hand, claims he never authorized such cancellation and protested against the same. He further claims that there was no consideration for such cancellation. Even so, if he did, in point of fact, authorize and agree to this cancellation, the indorser was released, as a person secondarily liable on a negotiable instrument is discharged "by the intentional cancellation of his signature by the holder." Neg. Inst. Law, § 201; *Larkin v. Hardenbrook*, 90 N. Y. 333; *Schwartzman v. Post*, 94 App. Div. 474. The

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<sup>4</sup> See the preceding note as to the effect of the Negotiable Instruments Law.—C.

fact that the crossing out of the indorser's name was made not by the plaintiff personally, but by defendant's representative in his presence, was a fact which the jury might have considered in determining whether the plaintiff's or the defendant's version of the facts was the correct one. They believed the defendant's version. It is not sufficient for the purpose of a reversal, on the ground that the result is against the weight of evidence, that the Appellate Court may have reached a different conclusion upon the facts than that arrived at by the jury, if there is sufficient evidence to support the verdict. In order to justify a reversal it must clearly appear that the fair preponderance of proof is really on the side of the defeated party. (*Lorenz v. Jackson*, 88 Hun. 202; *Clinton v. Frear*, 107 App. Div. 571.) In the case at bar, there is considerable evidence, which, if believed, justifies the verdict. This evidence the jury were at liberty to believe, and the Appellate Court does not feel warranted in setting aside the verdict. The learned counsel for the appellant urges that the court erroneously charged as follows: "Whenever any signature on a note appears to have been canceled, the burden of proof lies upon the party who alleges the cancellation was made under mistake or without authority; and, therefore, the plaintiff in this case has the burden of proof to establish that fact." There was no error here. The Negotiable Instruments Law, section 204, provides that: "A cancellation made unintentionally, or under a mistake, or without the authority of the holder, is inoperative; but where an instrument, or any signature thereon, appears to have been canceled, the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake, or without authority." In the case at bar, the signature of the indorser appeared to have been canceled, and plaintiff claimed it was canceled without authority. The burden, therefore, was on him to show that it was so canceled without authority. There are no other exceptions that require discussion.

The judgment and order appealed from must be affirmed, with costs.

## § 201

## JENKINS v. MACKENZIE.

6 UPPER CANADA, Q. B. 544. — 1849.

JAMES MCKENZIE made a note payable to Joseph Pierson or order, which Pierson indorsed; and after him, John James McKenzie (defendant) indorsed to Proby, who has since died leaving said Joseph Pierson one of his executors.

Pierson is now, as Proby's executor, plaintiff in an action against defendant McKenzie. Plea, that Pierson is liable over to defendant in case defendant should be obliged to pay. Demurrer to plea.

ROBINSON, C. J., delivered the judgment of the court. \* \* \*

The plea does not take the exception, that Pierson is discharged by being made executor by Proby. It would seem to be quite clear, that if Pierson were the maker, the debt would be discharged, for it would, as to the creditors, be regarded as assets in his hands, as executor, and so there could be no remedy against this indorser.<sup>5</sup>

We cannot hold the effect to be different, because Pierson, instead of being maker of the note, is an indorser, but prior to this defendant's indorsement. The effect is the same as if Pierson had paid the debt to the executors, or had been released without payment, after which there could be no remedy against any subsequent indorser.

As we see this to be the state of facts on the record, we must give judgment on demurrer for the defendant; for the objection is of that nature, that it goes to the very right of action and cannot be overlooked by us. (4 Scott's N. R. 287; 3 Esp., c. 46; 2 B. & P. 62; 9 B. & C. 130; 4 M. & Ry. 22; Co. Lit. 264 (b), note 209; 1 Wil. 46; 2 Bl. Rep. 1236; 4 T. R. 825; 2 Showers, 481; Story, Prom. Notes.)

PER CURIAM. — Judgment for defendant on demurrer.<sup>6</sup>

<sup>5</sup> DISCHARGE BY OPERATION OF LAW. — A transfer to acceptor or maker as executor of holder extinguishes the paper. *Freakley v. Fox*, 9 B. & C. 130. To the wife of the acceptor or maker at common law. *Abbott v. Winchester*, 105 Mass. 115. Or, after the marriage of a woman who has previously, while single, issued negotiable paper, a transfer to the husband. *Chapman v. Kellogg*, 102 Mass. 246.

It seems that negotiable paper is not extinguished by a discharge in bankruptcy or the running of the statute of limitations, but is revived by a new promise so that a subsequent transferee is entitled to enforce it. *Way v. Sperry*, 6 Cush. (Mass.) 238, citing cases *contra*.

So a debt barred by law is a sufficient consideration for a subsequent bill or note given for its payment. *Wislizenus v. O'Fallon*, 91 Mo. 184; *Giddings v. Giddings*, 51 Vt. 227; *Stafford v. Bacon*, 25 Wend. (N. Y.) 384; *Mull v. Van Trees*, 50 Cal. 547; *In re Merriman*, 44 Conn. 587.

A statutory bar to the enforcement of the consideration is not a bar to the enforcement of the bill or note, *e. g.*, the statute of frauds. *Jones v. Jones*, 6 M. & W. 84; *Edgerton v. Edgerton*, 8 Conn. 6; *Paul v. Stackhouse*, 38 Pa. St. 302. *Contra*: *Hooker v. Knab*, 26 Wis. 511; *Combs v. Bateman*, 10 Barb. (N. Y.) 573 (*semble*). Cf. *Raubitschek v. Blank*, 80 N. Y. 479. — H.

<sup>6</sup> Any voluntary act, or perhaps omission, of the holder which discharges a prior party (principal) will discharge a subsequent party (surety). Allowing statute of limitations to run in favor of principal or prior party. *Auchampaugh v. Schmidt*, 70 Iowa, 642; *Bridges v. Blake*, 106 Ind. 332; *Shutts v. Fingar*, 100 N. Y. 539. *Contra*: *Villars v. Palmer*, 67 Ill. 204; *Bull v. Coe*, 77 Cal. 54; *Banks v. State*, 62 Md. 88; *Moore v. Gray*, 26 Oh. St. 525. Bringing an action against prior party resulting in judgment for, and consequent discharge of, such prior party. *Ames v. Maclay*, 14 Iowa, 281; *Baker v. Merriam*, 97 Ind. 539; *State v. Coste*, 36 Mo. 437. But a discharge of a prior party by mere operation of law will not discharge the surety. Discharge in bankruptcy. *Phillips v. Wade*, 66 Ala. 53; *Lackey v. Steere*, 121 Ill. 598; *Post v. Losey*, 111 Ind. 74; *Cochrane v. Cushing*, 124 Mass. 219; *Linn v. Hamilton*, 34 N. J. L. 305; *Hall v. Fowler*, 6 Hill (N. Y.) 630. Discharge by war. *Bean v. Chapman*, 62 Ala. 58. — H.

## § 201

JOSLYN *v.* EASTMAN.

46 VERMONT, 258. — 1873.

ACTION on a note of which Hall was maker and defendant surety. Hall's administrator had tendered payment to plaintiff, which had been refused. Judgment for defendant.

The opinion of the court was delivered by —

ROYCE, J. \* \* \* The important question is, whether the defendant can avail himself of the benefit of the tender which the jury have found was made to the plaintiff. The obligation of the surety being accessory to that of the principal, the surety could not be called upon as long as the principal had done all that could be legally required of him in the performance of the contract. The tender which the jury have found was made, was legally sufficient, and would have been available as a defense in any suit the plaintiff might have instituted seeking a recovery out of the estate of Hall, and we think it is equally available to the defendant. When a debtor tenders payment of the debt for which the surety is obligated, and the creditor declines to receive it, he thereby discharges the surety. The judgment of the county court is affirmed. <sup>7</sup>

## § 201

ROCKVILLE BANK *v.* HOLT.

58 CONNECTICUT, 526. — 1890.

ACTION against the defendant as indorser of sundry notes and bills of exchange; brought to the Superior Court in Tolland county, and tried to the court before Torrance, J. Facts found and judgment rendered for the plaintiff, and appeal by the defendant. The case is fully stated in the opinion.

ANDREWS, C. J. — The L. B. Smith Rubber Company, a corporation doing business at Setauket, New York, being indebted to the defendant, gave him three promissory notes, and accepted three bills of exchange, representing such indebtedness and aggregating in the whole something more than five thousand dollars. All of the notes and bills were payable to the order of the defendant, were by him indorsed, and at his request were discounted for his benefit by the plaintiff. Shortly thereafter the Rubber Company failed. That failure compelled the defendant to go into insolvency. The plaintiff presented its claim against his insolvent estate and received a dividend thereon. The defendant having since that time acquired other property, the plaintiff brought this suit and attached such other property. Since the

<sup>7</sup> Accord: *Sears v. Van Dusen*, 25 Mich. 351; *Spurgeon v. Smitha*, 114 Ind. 453. Contra: *Clark v. Sickler*, 64 N. Y. 231. — H.

bringing of this suit the plaintiff, in common with nearly all the creditors of the L. B. Smith Rubber Company, including the defendant, signed an agreement which is fully set out in the finding, but which it is not necessary here to repeat. For the purposes of the present discussion it is sufficient to say that that agreement provided, among various other things, that the creditors of the rubber company should assign their claims to certain persons called a reorganizing committee, and that this committee should proceed to reorganize the company and should issue to each of the several creditors in payment for their respective claims the stock of the reorganized company, which the creditors agreed to accept. When the plaintiff signed the agreement it added to its signature: — “reserving all rights against R. G. Holt, or against his estate, or assignee for the benefit of his creditors.” These words did not appear in the body of the instrument.

The defendant insists that by signing the agreement the plaintiff assigned all its claims against the L. B. Smith Rubber Company to the reorganizing committee, and that as he is liable to the plaintiff only as a surety for that company the assignment of the claim against the principal debtor discharges him.

That an unqualified release of a principal debtor will be a discharge also of the surety is admittedly good law. The plaintiff, however, claims that by the reservation appended to its signature it is not affected by that rule. The defendant cites two cases, either of which by its terms fully supports his contention. But the authority of each of these cases is greatly weakened, if not entirely overturned, by later decisions in the same jurisdiction. *Webb v. Hewitt* (3 Kay & Johnson, 438), is substantially overruled by *Green v. Wynn* (L. R. 7 Eq. Cas. 31, and L. R. 4 Ch. Appeals, 204), and *Farmers' Bank v. Blair* (44 Barbour, 641), by *Morgan v. Smith* (70 N. Y. 545); *Colvo v. Davies* (73 N. Y. 211); *Nat. Bank v. Bigler* (83 N. Y. 51), and *Shutts v. Fingar* (100 N. Y. 539.)

It is stated in De Colyar on Principal and Surety (418), that such a reservation as was made by the plaintiff prevents there being any discharge of the surety, and gives as authority: (*Kearsley v. Cole*. 16 Mees. & Wels. 128; *Wyke v. Rogers*, 1 De G. M. & G. 409; *Boaler v. Mayor*, 19 C. B. N. S. 76, 84; *Owen v. Homan*, 4 H. L. Cases, 997; and *Close v. Close*, 4 De G. M. & G. 176. See, also, *Tobey v. Ellis*, 114 Mass. 120; *Kenworthy v. Sawyer*, 125 Id. 28; *Bank v. Lineberger*, 83 N. Car. 454; *Morse v. Huntington*, 40 Vt. 493; *Hagey v. Hill*, 75 Penn. St. 108; *Mueller v. Dobschuetz*, 89 Ill 176.) The weight of authority seems to us to be strongly adverse to the defendant's claim.

There is another view of the case which makes it clear that the defendant is not entitled to a discharge by reason of the plaintiff's signing the agreement. Whenever a creditor gives time to, or makes a

new contract with the principal debtor, of which new contract the surety has knowledge and to which he assents, he is not thereby discharged. (*Adams v. Way*, 32 Conn. 160; *Corlies v. Estes*, 31 Vt. 653; *Smith v. Winter*, 4 Mees. & Wels. 454.) The composition agreement was beneficial to all the creditors of the L. B. Smith Rubber Company, provided all entered into it. The defendant and his trustee in insolvency signed it before the plaintiff did. It was obviously for the advantage of each that the other should sign. Without some such arrangement neither could ever hope for any payment from that company. With such an arrangement there was a chance that they might both be paid in full. The plaintiff signed with the knowledge that the defendant and his trustee had previously signed. A composition deed implies not only an agreement of the debtor with each of his creditors, but also an arrangement by each creditor with each of the others. The signing of such a deed by any creditor is in some measure a request to all the others to sign also. The circumstances of this case show pretty clearly that the defendant knew of and assented to the act of the plaintiff in signing the agreement.

There is no error in the judgment complained of.

In this opinion the other judges concurred.<sup>8</sup>

## § 201 CONTINENTAL LIFE INSURANCE CO. v. BARBER.

50 CONNECTICUT, 567. — 1883.

CARPENTER, J. — This is an action against the executors of the estate of the late Gardner P. Barber, deceased, who, when in life, indorsed a note for \$8,000. The Superior Court found the facts and rendered judgment for the plaintiff. The defendants appealed. The record presents three questions.

1. Was the indorser discharged by the act of the plaintiff? The note fell due July 20th, 1874. On the 22d of October, 1874, the maker

<sup>8</sup> One who takes a bill as a holder in due course, and afterwards learns that the drawer is the principal and the accommodation acceptor the surety, may nevertheless release the drawer without thereby discharging the acceptor. *Fentum v. Pocock*, 5 Taunt. 192; *Farmers', etc., Bk. v. Rathbone*, 26 Vt. 19; *Howard Co. v. Welchman*, 6 Bosw. (N. Y.) 280; *Stephens v. Monongahela Bank*, 88 Pa. St. 157; *Diversy v. Moor*, 22 Ill. 330. Contra: *Ewin v. Lancaster*, 6 B. & S. 571; *Lacy v. Lofton*, 26 Ind. 324; *Canadian Bank v. Coumbe*, 47 Mich. 358; *Hall v. Capital Bank*, 71 Ga. 715; *Shelton v. Hurd*, 7 R. I. 403; *Westervelt v. Frech*, 33 N. J. Eq. 451.

But if there are two joint and several makers of a note, and, after learning that one is surety for the other, the holder releases or gives time to the principal, the surety is discharged. *Hubbard v. Gurney*, 64 N. Y. 457; *Harris v. Brooks*, 21 Pick. 195; *Whitehouse v. Hanson*, 42 N. H. 9; *Flynn v. Mudd*, 27 Ill. 323. See 2 Daniel on Neg. Inst., §§ 1322-1338. — H.

paid \$4,000, which was duly indorsed on the note. In December, following, being urged to pay the balance, and not being able to do so, he executed another note for the sum of \$4,000, payable to the order of the plaintiff, on demand, with interest semi-annually, and executed a mortgage of certain real estate to secure the payment thereof; and, having caused the same to be recorded, delivered it with the note to the plaintiff, without the knowledge of Barber. The plaintiff accepted the note and mortgage as additional security, but not in payment or satisfaction of the original note or any part thereof.

The claim is that the legal effect of accepting the note and mortgage was to give time to the maker of the note for \$8,000, and so discharge the indorser.

The law is well settled, hardly requiring repetition, much less the citation of authorities, that in order to discharge the indorser by giving time to the maker there must be a contract to that effect, express or implied; that is, the holder must have put it out of his power for the time being to proceed against the maker. The indorser cannot be deprived of the right, even for a short time, to pay the holder and proceed forthwith against the maker for his indemnity. The holder may not, during the time for which he has agreed to extend credit, bring a suit, for that would be a breach of his contract. He may not accept payment from the indorser and thereby subject the maker to an immediate suit by the indorser, for that would violate, if not the letter, certainly the spirit of his contract. Hence such a contract operates to discharge the indorser.

But here is no express contract, and we think none can be implied. It is expressly found that the second note was taken as additional security for the balance due on the original note and not in satisfaction of it nor as a substitute for it. Both notes were liable to be sued at any time, the one being overdue and the other on demand. Of course, the indorser could have paid the first note and could at once have brought a suit against the maker. He was also entitled to the additional security, and could at once have brought a suit on that note, and could also have proceeded to foreclose the mortgage. Instead of being prejudiced by the transaction, it was, in theory at least, a benefit to him.

The only features of the transaction which give any color to the defendant's claim are the facts that the collateral note, although on demand, was on interest payable semi-annually, and was secured by a mortgage; and it is urged with considerable force that these circumstances indicate an understanding between the parties that that note was to run at least six months. They certainly indicate that the parties contemplated that it might run six months, but that possibility does not change the character of the note and convert it from a note payable on demand to a note payable on time. It was still a

note due presently, and might be sued at once by the payee, and the indorser of the prior note might at any moment have placed himself in a position to sue it.

The supposed analogy to notes ordinarily taken by savings banks, insurance companies, etc., does not hold good. The object in those cases is to loan money, to make investments; the object here was to give additional security to a loan previously made and long since overdue, and which, we may add, was of a doubtful character. In the former cases the payee contemplates a present loan of money to continue for an indefinite time in the future; in the latter he is endeavoring to collect a loan previously made. It may be a breach of fair dealing to attempt to collect a note of the former description at once, but it by no means follows that it would be such a breach to attempt to collect one of the latter description. Moreover, the very object of making a note payable on demand is that the holder may collect it at any time if he sees good reason for doing so; and, legally speaking, he is the sole judge of the sufficiency of the reason; and that applies to the notes referred to as well as to the note in this case; so that the analogy, even if it exists, or so far as it does exist, does not avail the defendants. \* \* \*

There is no error in the judgment of the court below. <sup>9</sup>

## § 201 BRICK v. FREEHOLD NATIONAL BANK.

37 NEW JERSEY LAW, 307. — 1875.

THE opinion of the court was delivered by ———

DALRIMPLE, J. — The defendant in this case is sued as indorser of a promissory note. The defense is, that the plaintiffs, the holders of the note, received from the maker a conveyance of certain property as collateral security for the payment of the note, and that because of their failure to sell the collaterals and appropriate the proceeds of the sale to the liquidation of the debt, coupled with the fact that the property held as collateral, had somewhat depreciated in value, between

<sup>9</sup> The agreement for delay must be binding upon the holder in order to operate as a discharge of the indorser. *McLemore v. Powell*, 12 Wheat. (U. S.) 554; *Smith v. Erwin*, 77 N. Y. 466; *Cary v. White*, 52 N. Y. 138. The taking of a new note or bond payable at a future day is construed as sufficient evidence of a binding agreement to suspend the enforcement of the original obligation until the maturity of the new obligation. *English v. Darley*, 2 Bosanq. & P. 61; *Hubbard v. Gurney*, 64 N. Y. 457; *Siebeneck v. Anchor Bank*, 111 Pa. St. 187; *Hamilton v. Prouty*, 50 Wis. 592. But a reservation of rights against the surety is effective. *Tobey v. Ellis*, 114 Mass. 120; *Hagey v. Hill*, 75 Pa. St. 108; *Dupee v. Blake*, 148 Ill. 465; *Sohier v. Loring*, 6 Cush. (Mass.) 537; *National Bank v. Bigler*, 83 N. Y. 51. Extension to the maker of time to answer in an action brought by the holder, is not an extension of time of payment. *German-American Bank v. Niagara, etc., Co.*, 13 App. Div. (N. Y.) 450. — H.



the time of the maturity of the note and the commencement of the suit, the right of action as against the defendant, who is an accommodation indorser, is lost. This proposition cannot be maintained. It is well settled that mere delay by the creditor to sue the principal debtor will not discharge the surety, for the obvious reason that the surety may at any time discharge his obligation to the creditor, and thus made the principal his debtor. The same rule holds when collaterals are pledged by the principal debtor. The surety may at any time after the debt becomes due and owing, discharge it and take the collaterals. The law implies no contract on the part of the creditor to proceed on the collaterals before he can sue the surety. Nor are the rights of the parties affected by the fact that the collaterals have depreciated between the time of the maturity of the debt, for payment of which they were pledged, and the commencement of suit against the surety. These principles are recognized as sound law by the Court of Appeals of New York, in the well-considered case of *Schroepell v. Shaw*, reported in 3 Comstock, 446, 5 Barb. 580. \* \* \*

Rule to show cause should be discharged.<sup>1</sup>

## § 201

## WOLSTENHOLME v. SMITH.

34 UTAH, 300. — 1908.

ACTION on promissory note payable to the order of Joseph P. Megeath and signed by Grant H. Smith and J. E. Darmer, the defendants in this action. The note was indorsed to James Megeath, and this action is brought by his administrator.\*

STRAUP, J. \* \* \* The defendant Darmer, answering the complaint, alleged that his co-defendant, Smith, was the principal debtor; that he (Darmer) received no part of the loan or consideration for which the note was given, and that he signed it only as surety, which facts were known to both Joseph P. and James Megeath when the note was executed; that by a binding agreement Smith, and the holder of the note, extended the time of payment to October, 1902, without his knowledge or consent; that no demand was made upon him for payment until more than four years after the note became due; and that, by reason of the extension of time and of the delay in payment, he was prevented from protecting and securing himself. The court

<sup>1</sup> If a secured creditor part with the securities, the surety is discharged.

<sup>2</sup> Daniel on Neg. Inst., § 1311.

In New York the doctrine prevails that a surety may call on the creditor to proceed promptly against the principal, and failure to do so will discharge the surety to the extent of the loss suffered by the delay. *Pain v. Packard*, 13 Johns. 174; *Newcomb v. Hale*, 90 N. Y. 326, 329. But the doctrine does not extend to indorsers for value. *Trimble v. Thorne*, 16 Johns. 152; *Newcomb v. Hale*, *supra*. — H.

found the facts substantially as alleged in the answer, but as conclusions of law found that the defendant Darmer was a maker and primarily liable on the note, and therefore rendered judgment against him. From this judgment the defendant Darmer has appealed.

There is no doubt that under the decisions of this court prior to the enactment of chapter 83, p. 122, Laws 1899, relating to negotiable instruments, the facts alleged in the answer and found by the court constituted a defense, and discharged Darmer. It was the law generally in this country that a binding agreement between the principal and holder of a negotiable instrument, whereby the time of its payment was extended, relieved the surety, though he apparently signed as maker, if the holder had knowledge or notice that he was in fact a surety. It is, however, contended by the respondent that the law in this respect has been changed by the act in question. On the other hand, the appellant contends that it has not been changed, and that the law in this regard is now as it was before the enactment. We cannot agree with the appellant in this contention. The Negotiable Instruments Law enacted in 1899 is like that of the Bills of Exchange Act of 1882 of England, and of the Negotiable Instruments Law of New York, adopted in 1897, and of about 19 other states.

The particular sections pertinent to the question are:

[Quoting §§ 29, 60, 63, 119, 120 and 192 of the Utah statute.] <sup>2</sup>

By subdivision 6 of section 120 <sup>3</sup> it will be seen that a person secondarily liable on the instrument is discharged by an agreement binding on the holder to extend the time of payment. If, therefore, the appellant was only secondarily and not primarily liable on the instrument, he is discharged. Otherwise not, unless the instrument was discharged. Section 192 <sup>4</sup> makes a person primarily liable on the instrument who by the terms of the instrument is absolutely required to pay it. And by section 29 <sup>5</sup> an accommodation party in fact is liable on the instrument to the holder, notwithstanding such holder at the time of the taking of the instrument knew him to be only an accommodation party. Messrs. Eaton & Gilbert, authors of a recent work on negotiable paper, in considering the Negotiable Instruments Law in question, say in section 123f: "The statute only provides for the discharge by an extension of time of a person secondarily liable on the instrument. By the terms of the statute a person is primarily liable who by the terms of the instrument is absolutely required to pay the same. All others are secondarily liable. An accommodation maker or acceptor is absolutely liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party. It would seem to fol-

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<sup>2</sup> N. Y., §§ 55, 110, 113, 200, 201, and 3. — C.

<sup>3</sup> N. Y., § 201. — C.

<sup>4</sup> N. Y., § 3. — C.

<sup>5</sup> N. Y., § 55. — C.

low that the statute has disposed of the conflict of authority upon this question by holding the accommodation acceptor or maker to his apparent engagement as a principal debtor, and making him liable, notwithstanding an indulgence given to the endorser or drawer for whose benefit he became a party to the instrument."

The same question raised here was considered in the case of *Cellers v. Meachem*, 49 Or. 186,<sup>6</sup> and the conclusion was there reached that, under the new law, an accommodation maker was primarily liable, notwithstanding any knowledge the holder of the instrument might have had as to his relationship with the principal. To the same effect are the cases of *Vanderford v. Farmers' & Mechanics' Nat. Bank*, 105 Md. 164,<sup>7</sup> and *National Citizens' Bank v. Toplitz*, 81 App. Div. 593.<sup>8</sup>

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<sup>6</sup> This case is reported in 13 A. & E. Ann. Cas. 997, with note entitled, "Discharge of accommodation joint maker by extension of time to co-maker." See next note. — C.

<sup>7</sup> This case is reported in 10 L. N. S. 129, with note entitled "Effect under Negotiable Instruments Law of extension of time to principal, to release one who, on the face of the instrument, is primarily liable, but who is in fact a surety."

For notes on *Cellers v. Meachem*, 49 Or. 186, and *Vanderford v. Farmers', etc., Bank*, 105 Md. 164, see 7 Col. Law. Rev. 432, 5 Mich. Law Rev. 683, and 12 Law Notes, 122. Referring to these two decisions, a note in 47 Am. Law Reg., N. S., at page 343, says: "Not the least interesting thing about these decisions is the fact that such an interpretation was foreseen and warned against by Mr. Ames in his famous controversy with Brewster when the act was passed. He says, ('Comments and Criticisms upon the Negotiable Instruments Law, 14 Harvard Law Review, 241'), with reference to section 120 sub-sections 5 and 6 [N. Y., § 201] that 'another sub-section should be added, to the effect that an accommodation acceptor or maker, although the party primarily liable on the instrument, will be discharged if the holder, with knowledge of the accommodation, releases, or by a valid agreement undertakes to give time to the accommodated drawer or indorser.' And he adds: 'The authorities are almost unanimous on this point also, although in a few jurisdictions the accommodation party must resort to equity for his relief.' The failure to add the sub-section recommended by him rendered possible, and perhaps inevitable, the conclusion reached in these 1907 decisions. I say, 'perhaps inevitable,' for a possible way out has been indicated by Mr. Thomas A. Street in a brief note on these same cases in the eleventh volume of Law Notes, page 105. He criticizes the decisions in unmistakable terms, and points out the introduction of clause 4 in section 119 [N. Y., § 200] — 'by any other act which will discharge a simple contract for the payment of money,' — contemplated the arising of situations unprovided for by a definite section of the statute, and rendered possible their decision upon common law principles. This, he says, is such a situation. . . . Mr. Street ends his article with a short but cogent invective against what he calls smooth but dangerous defining clauses (of the nature of section 192 [N. Y., § 3]), in all uniform codes, which clog the free play of judicial interpretation. Certainly if such a clause permits a construction contrary to the design of the draughtsmen (see address of A. M. Eaton — Reports of American Bar Association for 1907 — page 1164) and subversive of a fundamental and generally accepted rule of the common law, the moral is not without its point." — C.

<sup>8</sup> Affirmed expressly on other grounds in 178 N. Y. 464. — C.

These cases are criticized by the appellant. He contends that the provisions of subdivision 4 of section 119,<sup>9</sup> which provide that a negotiable instrument is discharged "by any other act which will discharge a simple contract for the payment of money," was disregarded. He urges that a contract of suretyship is a simple contract, and the making of a binding agreement for an extension of time to the principal debtor has long been held to be an "act" sufficient to discharge the contract of the surety, and hence the facts alleged in the answer and found by the court were clearly a defense which is included in the general language of subdivision 4 of section 119.<sup>1</sup> To reach such a conclusion one must assume that the appellant was not primarily, but secondarily, liable on the instrument — the very thing to be decided — and the law that a person signing a negotiable instrument is not bound by his apparent obligation, but by his obligation in fact, has not been changed. Under the new law the appellant's apparent engagement as a maker and principal debtor is his real and actual engagement. He signed the note as a maker. By the terms of the instrument, he is absolutely required to pay it. The statute in such case makes him an actual principal and renders him primarily liable, though in fact he received, with the knowledge of the holder, no part of the consideration, and only signed the note for the purpose of lending his name to another. Having signed the note as an apparent maker and principal debtor, he cannot thereafter be heard to assert the contrary so as to affect his liability on the instrument. Section 119 deals, not with the discharge of parties, but with the discharge of the instrument. Of course, if the instrument is discharged, all parties are discharged, whether primarily or secondarily liable. If it was meant that a binding agreement to extend the time of payment should discharge a person, whether primarily or secondarily liable, and is included, as is contended, in the general language of subdivision 4 of section 119, then there was no occasion to insert the provision in section 120 making it a ground of discharge as to a person secondarily liable. Being so inserted strongly indicates that it was the intention to make it a ground to discharge a person only secondarily liable, and not a person primarily liable. While an agreement binding on the holder to extend the time of payment was generally held sufficient to discharge a surety, yet it did not discharge the instrument, nor the principal debtor. It was not such an act as will discharge the instrument itself within the meaning of subdivision 4 of section 119.

Being of the opinion that the appellant is primarily liable on the instrument, and that the facts alleged in the answer and found by the court do not constitute a discharge of the instrument, it follows

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<sup>9</sup> N. Y., § 200. — C.

<sup>1</sup> This is the same contention as was made by Professor Street in his article in 11 Law Notes, 105. See note 7, *ante*. — C.

that the judgment of the court below must be affirmed, with costs. It is so ordered.

MCCARTY, C. J., and FRICK, J., concur.<sup>2</sup>

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<sup>2</sup> In addition to the cases cited in the principal case, see also the following cases in accord: *Bradley Engin. & Mfg. Co. v. Heyburn*, 56 Wash. 628; and *Richards v. Market Exch. Nat. Bk.*, 81 Oh. St. 348 (criticized at length in 8 Ohio Law Reporter, 25-30).

In *Richards v. Market Exch. Bank*, *supra*, the additional argument was made that the extension of time worked a material alteration in the instrument, thus discharging the defendant. On this proposition, Spear, J., said: "The question thus made is: Does the extension work a 'material alteration' in the instrument? The argument in support of the claim that it does is rested upon the proposition laid down by Brandt on Suretyship as follows: 'Any agreement between the creditor and principal which varies essentially the terms of the contract by which the surety is bound without the consent of the surety will release him from responsibility.' We think this does not satisfy the requirements of the sections above quoted. It does not imply an alteration of the instrument. It is but a statement of the equitable rule hereinbefore stated and considered. It must be borne in mind, as an absolute controlling condition, that it is the instrument itself which the foregoing sections of the statute treat of, not the contract which the instrument is intended to evidence. This, it seems to us, is so manifest on the face of the printed word that it cannot be more clearly shown by comment, and hardly needs authority in its support. Nevertheless the question has been considered by text-writers and passed upon in a number of adjudicated cases. See 1 Bouvier, Law Dictionary, 153, under title 'Alteration,' and authorities there cited; also 2 Cyc. of Pl. & Pr. 142, under head of 'Alteration of Instruments,' and authorities there cited; also 2 Am. & Eng. Ency. of Law, 184, under same head, and authorities. Again, if these sections were intended to apply to a condition other than a physical alteration of the instrument, we would expect to find the provisions under section 3175j, [N. Y., § 200] where the subject of discharge of instruments is specially treated, and we would not expect to find it elsewhere repeated. We should be slow to ascribe careless and needless tautology to the law-making body."

But in *Northern State Bank of Grand Forks v. Bellamy*, 125 N. W. (N. Dak.) 888 (April, 1910), it was held that the defendant, who had signed a note as an absolute guarantor of payment of the same, and not as a surety, was released from liability on the note by the act of the plaintiff in extending the time of payment to the principal debtor without the knowledge or consent of the defendant. It was conceded that this was the rule prior to the Negotiable Instruments Law. As to the effect of this enactment, Ellsworth, J., said: "The terms 'primary and secondary,' when they apply to the parties to an obligation, 'refer to the remedy provided by law for enforcing the obligation, rather than to the character and limits of the obligation itself.' *Kilton v. Prov. Tool Co.*, 22 R. I. 605. Therefore, however closely analogous may be the ultimate liability upon the instrument of surety and guarantor, the clear distinction in the character of their respective contracts, and the procedure by which their obligations must be enforced, operates to place these parties in different classes of the persons liable as defined by the new law of negotiable instruments. The purpose in making a classification not provided by the former law would seem to be to strengthen the credit of negotiable paper by protecting the holder against a claim that persons

### III. Payment by party secondarily liable.

§ 202

GARDNER *v.* MAYNARD.

7 ALLEN (MASS.) 456. — 1863.

CONTRACT against the acceptor of a draft for \$1,000, drawn by Sandford C. Gardner, in favor of J. & C. Levy & Co., upon the defendant. The draft was duly indorsed and accepted.

At the trial in the Superior Court, before Allen, C. J., it appeared that the draft was protested for non-payment, and returned to Levy & Co., and was afterwards returned to the drawer, who assigned it by bill of sale to the plaintiff, with the indorsement of Levy & Co. remaining uncanceled. A witness testified that he saw the draft indorsed by one of the firm of Levy & Co., and did not see any money paid at that time.

Upon these facts, the chief justice directed a verdict for the defendant, which was accordingly rendered; and the plaintiff alleged exceptions.

METCALF, J. — These exceptions must be overruled and judgment rendered on the verdict for the defendant, upon the authority of *Beck v. Robley*, 1 H. Bl. 89, n. That case and this are alike in all particulars. In both, the bill was made payable, not to the drawer's own order, but to a third party, who indorsed it, was accepted by the drawee, but afterwards was dishonored by his refusing to pay it, and was taken up from the indorser by the drawer, with the indorser's name remaining uncanceled. In that case it was decided that the bill was not negotiable, and that the drawer could not reissue it. And that decision has never been overruled or denied, but is cited as established law in all the books that treat of bills of exchange. (See, 1 Steph. N. P. 863; Story on Bills, § 223; *Guild v. Eager*, 17 Mass. 615; Opinion of Patteson, J., in *Williams v. James*, 15 Ad. & El. N. S. 505.) The doctrine of that decision is, that a bill of exchange cannot be indorsed or negotiated, after it has once been paid, if such indorsement or negotiation would make any of the parties liable, who would otherwise be discharged. (Bayley on Bills, 6th ed. 166, 167; Chit., Bills,

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directly and absolutely liable by the terms of the instrument had in fact signed, not as joint makers, but in some other capacity. As the law now stands, these questions of primary and secondary liability are to be resolved only upon the face of the instrument. All persons by its terms absolutely required to pay the same may be held as primarily liable; all others, secondarily. When a party on signing clearly indicates upon the instrument the capacity in which he is willing to be bound, the holder in accepting it cannot misapprehend its true quality, for he then knows that the party may be held in that capacity and no other. Appellant signed as guarantor, and, as in that capacity he was secondarily liable upon the instrument, he was released, as under the former law, by an extension of time to the principal debtor without his assent. As affecting him the principle governing the relation of holder and guarantor under the former law is unchanged." — C.

12th Am. ed. 254, 255.) As the first indorser of a bill is liable to every subsequent *bona fide* holder, although the bill be fraudulently circulated, it follows that if he leaves his name thereon, after he is entitled to a discharge, he exposes himself to liability to such holder. Therefore the bill is held not to be negotiable in such case.

This rule of law applies only to cases in which the negotiation of a bill by the drawer, after he has taken it up on its being returned to him dishonored, would expose a discharged party to a new liability. See *Callow v. Lawrence*, 3 M. & S. 95; *Hubbard v. Jackson*, 4 Bing. 390; *Bayley, Chit.*, and 17 Mass. *ubi supra*; *Mead v. Small*, 2 Greenl. 207.)

Exceptions overruled.<sup>3</sup>

## § 202

## BLENN *v.* LYFORD.

70 MAINE, 149. — 1879.

APPLETON, C. J. — This is an action of assumpsit on the following note: —

ST. ALBANS, ME., Dec. 2, 1871.

Seven months from date, value received, I promise to pay M. E. Rice, or order, three hundred dollars, at any bank in Bangor.

H. H. LYFORD.

[The note was indorsed in blank] M. E. RICE.

[The following words were also on the back of the note, erased with ink but legible]: Holden without demand or notice. M. E. RICE.

Granting the presumption that the plaintiff is a *bona fide* holder for value of the note before maturity, that presumption may be overcome by proof.

It appears from the testimony that the note was indorsed to one Richardson, for value, in the April following its date; that it was not paid at maturity, and that about three months after its dishonor he delivered it to Rice, the payee.

The plaintiff then received the note in suit, when overdue. The note remaining unpaid after maturity was dishonored, and it was the duty of the indorsee to make inquiries concerning it. If he takes it, though he gave a full consideration for it, he does so on the credit of the indorser. He holds the note subject to all equities with which it may be incumbered. As the plaintiff is the indorsee of a dishonored note, it was competent for the defendant to show that it was an accommodation note, and that it had been paid by the party for whose accommodation it was given.

That the note was for the accommodation of the payee is abundantly shown by his receipt of the date of February 22, 1872, as well as by the testimony offered and excluded.

<sup>3</sup> Accord: *Price v. Sharp*, 2 Ired. Law (N. C.) 417. — H.

The note being for the accommodation of Rice, it was his duty to pay it. The note being found after dishonor in the hands of the one bound to pay it, the presumption is that he paid it. (2 Par. N. & B. 220.) It was competent to show that in fact he paid it, but the answer to an inquiry whether the note was paid by Rice was excluded. This was erroneous.

Assuming the note to have been paid by Rice, it was the same as if paid by the maker. It was paid by the party whose duty it was to pay it. The purpose for which it was given has been accomplished. The negotiability of a note ceases after its payment by the party who should rightfully pay it. "Now it cannot be denied," says Denman, C. J., in *Lazarus v. Cowie* (43 E. C. L. 819), "that if a bill be paid when due by the person ultimately liable on it, it has done its work, and is no longer a negotiable instrument. \* \* \* But the drawer of an accommodation bill is in the same situation as the acceptor of a bill for value; he is the person ultimately liable, and his payment discharges the bill altogether."

Rice, when he took up the note in suit, had no right of action against the maker, and could not transfer to the plaintiff any better right after maturity than he had. (Edwd. B. & N. 564; *Fish v. French*, 15 Gray, 520; *Tucker v. Smith*, 4 Maine, 415.)

In the cases cited by the plaintiff there are most important differences from the one under consideration. In *Bank v. Crew* (60 N. Y. 85), the plaintiffs were the indorsees of the note for value and before maturity, and were consequently to be protected. In *Thompson v. Shepard* (12 Met. 311), it was held that the indorsee of a note, who receives it for value from the second indorser, after it has been dishonored by the maker, can recover thereon against the maker, although he knew when he received it that as between the maker and first indorser it was an accommodation note. But this is upon the principle affirmed by the court in *Woodman v. Churchill* (52 Maine, 58), that where the first indorsee of a promissory note acquires a right of action against the maker, by being a *bona fide* purchaser, without notice and before maturity, he can transfer a good title as well after as before the note becomes due.

Exceptions sustained.

Action to stand for trial. <sup>4</sup>

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#### IV. Payment for honor.

SEE ART. XV, *post*, pp. 707-708.

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<sup>4</sup> Accord: *Merrill v. First N. B.*, 94 Cal. 59; *Cottrell v. Watkins*, 89 Va. 801.—H.



## ARTICLE X.

### BILLS OF EXCHANGE: FORM AND INTERPRETATION.

#### I. Form.

##### 1. FORMAL REQUISITES GENERALLY.

§ 210      See ARTICLE II. *Ante*, pp. 34–161.

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##### 2. THE DRAWEE OR DRAWEEES.

(a) *Must be certain.*

§ 210      See ARTICLE II. *Ante*, pp. 148–150.

(b) *May be joint, but not alternative or successive.*

§ 212      TOMBECKBEE BANK *v.* DUMELL & LYMAN.

[*Reported herein at p. 687.*] <sup>1</sup>

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§ 212      JACKSON *v.* HUDSON.

2 CAMPBELL, 447. — 1810.

THIS was an action against the defendant as acceptor of a bill of exchange, which was drawn and accepted in the following form:

LONDON, 30th December, 1809.

Two months after date, pay to my order 157*l.*, for value received.

F. JACKSON.

To Mr. I. IRVING

*Accepted*, I. IRVING

*Accepted*, Jos. HUDSON, payable at Mr. Hudson's, 132 Oxford street.\*

The first count of the declaration stated, that the bill was directed to Irving; the second took no notice of there being any drawee; and both averred that the defendant accepted it, "according to the usage and custom of merchants."

*Garrow* for the plaintiff stated, and undertook to prove, that the plaintiff having dealings with Irving concerning the sale of goods,

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<sup>1</sup> An acceptance by some one or more of several drawees, but not by all, is a qualified acceptance. See Neg. Inst. L., § 229, subsec. 5. — H.

refused to sell him any more, unless the defendant would become his surety; that the defendant agreed to this; that goods to the value of 157*l.* were in consequence sold by the plaintiff to Irving; that the bill in question was drawn for the price of them, and that the defendant with a knowledge of all these facts, had put his name upon the bill as acceptor. He must, therefore, be considered as having accepted the bill jointly with Irving; and as he had not pleaded in abatement, he was separately liable in the present action.

LORD ELLENBOROUGH. — If you had declared, that in consideration of the plaintiff selling the goods to Irving, the defendant undertook that the bill should be paid, you might have fixed him by this evidence. But I know of no custom or usage of merchants, according to which, if a bill be drawn upon one man, it may be accepted by two. The acceptance of the defendant is contrary to the usage and custom of merchants. A bill must be accepted by the drawee, or, failing him, by some one for the honor of the drawer. There cannot be a series of acceptors.<sup>2</sup>

The defendant's undertaking is clearly collateral, and ought to have been declared upon as such.

Plaintiff nonsuited.

§ 212 ANON. 12 Mod. 447 (1701). A bill of exchange was directed to A, or, in his absence, to B, and began thus: "Gentlemen, Pray pay." The bill was tendered to A, who promised to pay it as soon as he could sell such goods; and in an action against him for nonpayment, the declaration was of a bill directed to him without any notice of B, and Holt held it well.<sup>3</sup>

### 3. REFEREE IN CASE OF NEED.

#### § 215 CHITTY ON BILLS OF EXCHANGE, ETC., p. 188.

WHEN the drawer has any apprehension that the drawee will either not accept, or not pay the bill, he may, as a matter of precaution, to prevent the expenses and inconveniences resulting from a return of the bill, require the holder in such an event, to apply to a third person,

<sup>2</sup> There seems to be no direct authority upon this proposition of the Neg. Inst. L., § 212. In the case above but one drawee is named and the conclusion is that no other person can accept. Of course successive "drawees in case of need" may be named in the bill. Neg. Inst. L., § 215. — H.

<sup>3</sup> In this case B. may have been a "drawee in case of need;" if not, it is contrary to the statutory rule. A note cannot be made payable by two makers in the alternative. *Ferris v. Bond*, 4 B. & Ald. 679. — H.

named in the bill for that purpose. This requisition is intimated by writing in the corner of the bill, under the drawee's address, these words, "*Au besoin chez Messrs. —, at —,*" or, in other words, "In case of need apply to Messrs. —, at —." This, in effect, points out one or more persons whom the drawer is desirous, in case of refusal or failure by the drawee, to become parties to the bill, in the nature of an acceptor or payer for honor; and is valid and usual on the Continent, though we have just seen that there cannot be a series of acceptors. (1 Pardess. 351, 394, 437-8; *Jackson v. Hudson*, 2 Campb. 447.) The holder is bound to apply to the parties so addressed,<sup>4</sup> (1 Pardess. 438), and who may accept and pay without previous protest, in which respect he differs from an acceptor *supra protest* (1 Pardess. 438); and the party so paying has a right to sue the drawer for the amount. (1 Pardess. 438.) It should seem, however, that the introduction of these words rather imports an apprehension that the bill will not be regularly accepted or paid, and therefore tends to diminish the credit which might otherwise be attached to the bill without such desire being expressed.<sup>5</sup>

## II. Interpretation.

### 1. BILL NOT AN ASSIGNMENT OF FUNDS.

#### § 211

#### HOLBROOK *v.* PAYNE.

151 MASSACHUSETTS, 383. — 1890.

PLAINTIFF by "trustee process" attached funds in the hands of the town of Winchester belonging to defendant. Alexis Cutting intervened as claimant of the funds.

The town owed defendant \$217.27 on an account stated. Defendant gave Cutting this order: "Winchester, July 12th, '88. Town of Winchester. Pay to the order of A. Cutting ninety and thirty-two hundredths dollars, value received, and charge the same to account of H. B. Payne." He gave similar orders amounting to \$65.27 to four other persons, who also appear as claimants. The orders were all left with the selectmen of the town, where they continued to remain, but were never formally accepted.

HOLMES, J. — The defendant in this action has been defaulted, and the question before us is whether the plaintiff or the claimant Cutting

<sup>4</sup> This seems to have been so before the enactment of the Bills of Exchange Act, § 15, and the Neg. Inst. L., § 215. See Chalmers, Bills of Exchange Act (5th ed.) pp. 38-39. — H.

<sup>5</sup> There is little English or American authority upon the "referee in case of need." See *Leonard v. Wilson*, 4 Tyrwh. 415; *In re Leeds Banking Co.*, L. R. 1 Eq. 1. — H.

is entitled to a certain part of the debt due from the trustee to the defendant.

There is no doubt that an order for a specific fund, identified by the order itself, may be a good assignment. (*Kingman v. Perkins*, 105 Mass. 111). We assume in favor of the claimant that an equitable assignment to him of a part of the debt would be good as between him and the plaintiff upon trustee process. (*Dana v. Third National Bank*, 13 Allen, 445, 447; *James v. Newton*, 142 Mass. 366, 374.) Our difficulty is to discover any ground for saying that the instrument relied upon constituted such an assignment.

On its face, the order given to the claimant by the defendant does not refer to a particular fund or debt, but is an ordinary negotiable draft, or unaccepted bill of exchange, drawn upon the town on the general credit of the drawer. An indorsement of the instrument by the claimant would have given the indorsee a right of action in his own name against the drawer, if the draft should be dishonored. But the fact that the order is a negotiable instrument on its face shows that it is not drawn against a particular fund. If it were drawn against a particular fund, it would not be negotiable.<sup>6</sup> (*Wheeler v. Souther*, 4 Cush. 606, 607; *Harriman v. Sanborn*, 43 N. H. 128.)

The case is stronger for holding a check upon a bank to be an assignment, than it is for holding an ordinary draft to be so. A check is supposed to be drawn against a fund deposited, for which, to be sure, the bank is no more than a debtor; but a debtor on the implied term that the creditor has a right to split up the debt at will, and to require part payments in such amounts, at such times, and to such persons as he chooses. In general, the creditor has no right to draw above the amount of his deposit, and would be guilty of a fraud if he obtained money or goods for a check knowingly so drawn. Yet the weight of authority is that a check is not an assignment either at law or in equity.<sup>7</sup> (*Bullard v. Randall*, 1 Gray, 605; *Dana v. Third National Bank*, 13 Allen, 445, 447; *Attorney-General v. Continental Life Ins. Co.*, 71 N. Y. 325; *First National Bank of Mount Joy v. Gish*, 72 Penn. St. 13; *Hopkinson v. Forster*, L. R. 19 Eq. 74; *Schroeder v. Central Bank of London*, 24 W. R. 710. See *Laclede Bank v. Schuler*, 120 U. S. 511, 514.)

*A fortiori*, the same rule must hold good of an ordinary draft unaccepted, which does not import the existence of a debt from the drawee to the drawer, but leaves the matter of the drawee's reimbursement to such private arrangements as may exist between the drawer and himself. And so are the decisions: (*Whitney v. Eliot Nat. Bank*, 137 Mass. 351, 355, 356; *National Exchange Bank v. McLoon*, 73 Maine, 498, 511; *Bank of Commerce v. Bogy*, 44 Mo. 13. See *First*

<sup>6</sup> See Neg. Inst. L., § 22. — H.

<sup>7</sup> See Neg. Inst. L., § 325. — H.

*Nat. Bank of Canton v. Dubuque Southwestern Railway*, 52 Iowa, 378.)

There is no extrinsic fact in the present case which gives the document a different effect from that which results from its tenor, if it be possible that its effect should be varied by parol. (See *Whitney v. Eliot Nat. Bank*, *supra*; *Griffin v. Weatherby*, L. R. 3 Q. B. 753, 759; *First Nat. Bank of Canton v. Dubuque Southwestern Railway*, 52 Iowa, 378.) The defendant had done work for the town, and his only right to draw was in respect of the price of his work. If we assume this fact to have been known to all parties concerned, still it only shows that the town was known to have means of indemnifying itself if it saw fit to pay. It does not enlarge the meaning of the draft beyond that which it bears on its face, of a general request to the town to pay. Even a reference to a fund out of which a drawee may indemnify himself will not take away the negotiable character of the draft.<sup>8</sup> We may remark that the concluding words of the draft in question are "charge to account of." In some of the others, they are "charge to the account of," which is slightly more specific. But we do not see any sound distinction in favor of the latter. If the town had accepted the order, having power to do so, it would have become liable on a direct and absolute contract to the claimant, very likely having a right to withhold an equal amount of its debt to the defendant. But mere retention of the draft was not acceptance.<sup>9</sup> (*Overman v. Hoboken City Bank*, 2 Vroom, 563.)

Trustee charged. Judgment for plaintiff.<sup>1</sup>

## 2. INLAND AND FOREIGN BILLS.

### § 213

#### YALE v. WARD.

30 TEXAS, 17. — 1867.

THE bill on which suit was brought was in these words, with the indorsement of "Henderson, Terry & Co.," across the face of the note: —

<sup>8</sup> Neg. Inst. L., § 22; *ante*, pp. 50-54. — H.

<sup>9</sup> See Neg. Inst. L., § 225. — H.

<sup>1</sup> As to whether a bill is an assignment there has been a conflict of authority, especially where the bill is drawn for the whole of the fund. See 1 Daniel on Neg. Inst., §§ 15-23; 2 Am. & Eng. Encyc. L. (2nd ed.), pp. 1062-1064. That a bill drawn for the whole of a fund is not an assignment, see *Shand v. Du Buisson*, 18 Eq. Cas. 283; *First N. B. v. Dubuque S. R. R.*, 52 Iowa, 378; *Bush v. Foote*, 58 Miss. 5; *Bank v. Bogy*, 44 Mo. 15. But an order for a payment of a particular, specified debt in full, is an assignment. *Lewis v. Bank*, 30 Minn. 135; *Brady v. Chadbourne*, 68 Minn. 117; *Moore v. Daris*, 57 Mich. 255. — H.

\$307.78.

NEW ORLEANS, 2d May, 1861.

On the 12th day of December, after date, pay to the order of C. Yale, Jr. & Co., \$307.78, value received, and charge the same to account of

MATT. WARD.

To Messrs. HENDERSON, TERRY &amp; Co.

To it was attached the usual formal protest, dated "United States of America, State of Louisiana," by a "notary of the parish of New Orleans, State of Louisiana," 14th December, 1861.

WILLIE, J. \* \* \* There being no allegation to the contrary, we must treat the draft upon which this suit is founded as a domestic bill of exchange. Neither the place where the draft was drawn, nor where it was accepted, is stated in the petition. The instrument itself, made part of the petition, purports to have been drawn at New Orleans; but there is no averment that this place is beyond the limits of Texas. This court has held, that it will not take judicial notice of the division of other states into towns, cities, etc., and that knowledge of the fact that any place is within a different state of the Union must be derived from the allegations of the parties or the evidence contained in the record. (*Andrews v. Hoxie*, 5 Tex. 185; 4 Tex. 420.)

The rights of the parties to this contract, therefore, must be ascertained, and their liabilities fixed according to the law of our own state.<sup>2</sup> \* \* \*

### 3. BILL TREATED AS PROMISSORY NOTE.

§ 214

FUNK v. BABBITT.

[Reported herein at p. 150.]<sup>1</sup>

<sup>2</sup> Accord: *Kearney v. King*, 2 B. & Ald. 301; *Riggin v. Collier*, 6 Mo. 568. A bill drawn and dated in Philadelphia, payable in London, but actually delivered by the drawers in London, is to be treated as a foreign bill in the hands of a *bona fide* holder. *Lennig v. Ralston*, 23 Pa. St. 137. A bill drawn and delivered in Wisconsin, but dated and payable in Illinois, is an inland bill, as between the parties. *Strawbridge v. Robinson*, 10 Ill. (5 Gilman) 470. — H.

<sup>1</sup> "Where a party frames his instrument in such a way that it is ambiguous whether it be a bill of exchange or a promissory note, the party holding it is entitled to treat it either as one or the other, and the plaintiff ought not to be defeated by the party who framed the instrument being allowed to say that it is a bill of exchange" [where such party has had no notice of dishonor]. *Edis v. Bury*, 6 B. & C. 433. See also *Lloyd v. Oliver*, 18 Q. B. 471; *Heise v. Bumpass*, 40 Ark. 545; 4 Am. & Eng. Encyc. Law (2d ed.), pp. 119-123. — H.

## ARTICLE XI.

### ACCEPTANCE OF BILLS OF EXCHANGE.

#### I. Form and effect.

##### 1. ACCEPTANCE MUST BE IN WRITING AND SIGNED BY DRAWEE.

(a) *Writing and signature.*

#### § 220

SPEAR *v.* PRATT.

2 HILL (N. Y.) 582. — 1842.

ACTION against Pratt as acceptor. Judgment for plaintiff. The defendant's name was written across the face of the bill; and the question was whether this was such an acceptance as is required by statute.

*By the Court, COWEN, J.* — Any words written by the drawee on a bill, not putting a direct negative upon its request, as "accepted," "presented," "seen," the day of the month, or a direction to a third person to pay it, is *prima facie* a complete acceptance, by the law merchant. (Bayley on Bills, 163, Am. ed. of 1836, and the cases there cited.) Writing his name across the bill, as in this case, is a still clearer indication of intent, and a very common mode of acceptance. This is treated by the law merchant as a written acceptance — a signing by the drawee. "It may be," says Chitty, "merely by writing the name at the bottom or across the bill;" and he mentions this as among the more usual modes of acceptance. (Chitty on Bills, 320, Am. ed. of 1839.)

It is supposed that the rule has been altered by 1 R. S. 757 (2d ed.) § 6. This requires the acceptance to be in writing, and signed by the acceptor or his agent. The acceptance in question was, as we have seen, declared by the law merchant to be both a writing and a signing. The statute contains no declaration that it should be considered less. An indorsement must be in writing and signed; yet the name alone is constantly holden to satisfy the requisition. No particular form of expression is necessary in any contract. The customary import of a word, by reason of its appearing in a particular place, and standing in a certain relation, is considered a written expression of intent quite as full and effectual as if pains had been taken to throw it into the most labored periphrase. It is said the revisers, in their note, refer to the French law as the basis of the legislation which they recommend; and that the French law requires more than the drawee's name — the word accepted, at least. That may be so; but it is enough for us to see that both the terms and the spirit of the act may be satisfied short of that

word, and more in accordance with the settled forms of commercial instruments in analogous cases. The whole purpose was probably to obviate the inconveniences of the old law, which gave effect to a parol acceptance.

New trial denied.<sup>1</sup>

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(b) *Only the drawee can accept.*

§ 220

WALTON v. WILLIAMS.

44 ALABAMA, 347. — 1870.

ACTION against James W. Walton as acceptor of a bill addressed to James J. Walton. Defendant offered to prove that he signed as indorser, but the court excluded the evidence. Judgment for plaintiff.

SAFFOLD, J. — The only evidence that the defendant accepted the bill, is his signature across its face. It is where the acceptor's signature is usually found, and in the absence of proper rebutting testimony this would be sufficient proof of the fact, if it was directed to him, or without direction to anyone. But the name of James J. Walton is also found in the position on the bill usually occupied by the drawee, and he must be considered the drawee as well as the drawer.

Where a bill is directed to a particular person, no one but the person to whom it is directed can accept it, except for honor. (*May v. Kelly & Frazier*, 27 Ala. 497.) If the defendant was an acceptor, he was one *supra* protest, and his obligation was, that if the bill was not paid by the drawee upon due presentment at its maturity, then upon protest for nonpayment, and due notice thereof to him, he would pay it. (Story on Bills of Ex., § 123; 3 Wend. 491.)

There was no proof, in this case, of protest and notice, and for this reason the charge of the court was erroneous.

The plaintiff was the payee. It was, therefore, clearly competent to show by parol the intention of the parties, at the time the contract was

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<sup>1</sup> By the English and American decisions parol acceptance of an existing bill is sufficient. 1 Daniel on Neg. Inst., § 504 *et seq.*; *Scudder v. Bank*, 91 U. S. 406, 413. In England, since 19 and 20 Vict., c. 97, the acceptance must be written on the bill. Bills of Exchange Act, § 17, subsec. (2). In the U. S. where there are statutory provisions they generally provide for an acceptance in writing; but this need not be upon the bill. An acceptance by telegraph has been held good. *North Atchison Bank v. Garretson*, 51 Fed. Rep. 168, note p. 35, *ante*. See also *Spaulding v. Andrews*, 48 Pa. St. 411. But, by § 221, of the Neg. Inst. L., the holder is entitled to require the acceptance to be written upon the bill; and by § 222 an extrinsic acceptance is binding only in favor of one to whom it is shown and who takes the bill on the faith thereof. This latter provision is a departure from the judicial decisions upon this point. *Spaulding v. Andrews*, 48 Pa. St. 411; *Jones v. Council Bluffs Bank*, 34 Ill. 313. — H.



entered into, with regard to their several liabilities among themselves, and the relation which they were to bear to the bill. (*Branch Bank at Mobile v. Coleman*, 20 Ala. 140.)

The evidence of the defendant, who was a competent witness under section 2704 of the Revised Code, ought to have been admitted.

The judgment is reversed and the cause remanded.<sup>2</sup>

## § 220

## JACKSON v. HUDSON.

[Reported herein at p. —.]

### (c) Delivery Necessary.

DUNAVAN v. FLYNN, 118 Mass. 537. — 1875. GRAY, C. J. — It was rightly held that the mere writing of the acceptance upon the bill, not communicated to the drawer or holder, and the detention of the bill in the defendant's custody, did not bind him, or operate as a payment of his debt to the drawer. (*Clavey v. Dolbin*, Cas. temp. Hardw. 278; *Jeune v. Ward*, 2 Stark. 326; s. c., 1 B. & Ald. 653; *Mason v. Barff*, 2 B. & Ald. 26; *Cox v. Troy*, 5 B. & Ald. 474, s. c., 1 Dowl. & Ryl. 38; *Overman v. Hoboken City Bank*, 1 Vroom, 61, and 2 Vroom, 563.)<sup>3</sup>

<sup>2</sup> Accord: *Davis v. Clarke*, 6 Q. B. R. 16; *Smith v. Lockridge*, 8 Bush (Ky.) 423. In *Markham v. Hazen*, 48 Ga. 570, the stranger-acceptor was held as guarantor.

If a bill is directed to an agent (A.) and accepted by him in the name of his principal (X. Co., by A.), no one is bound; not the agent, for he has not accepted; not the principal, for it is not the drawee. *Walker v. Bank*, 9 N. Y. 582.

If a bill is directed to a partnership (A. B. & Co.) and is accepted by one partner in his own name, it has been held that no one is bound; not the partnership, for it has not accepted; not the partner, for he is not the drawee. *Heenan v. Nash*, 8 Minn. 407. Contra: *Owen v. Van Uster*, 20 L. J. C. P. 61. See note p. 306, *ante*. This is to be distinguished from the case of a bill directed to two or more drawees and accepted by one. See § 212, § 229, subsec. 5. — H.

<sup>3</sup> Acceptance without re-delivery is ineffective. *Freund v. Importers' Bank*, 3 Hun (N. Y.) 689. Except as provided in § 225, *post*. But see 2 Ames' Cases on Bills and Notes, p. 790. An acceptance once completed by delivery is, in the absence of fraud on the part of the holder in procuring the acceptance, irrevocable. *Trent Tile Co. v. Fort Dearborn N. B.*, 54 N. J. L. 33, 599; *Fort Dearborn N. B. v. Carter*, 152 Mass. 34. — H.

## 2. ACCEPTANCE BY SEPARATE INSTRUMENT.

§ 222 FIRST NATIONAL BANK OF ATCHISON *v.* COMMERCIAL SAVINGS BANK.

74 KANSAS, 606. — 1906.

DEMURRER to petition overruled. Judgment for plaintiff, and defendant brings error.

BURCH, J. — J. F. Donald, having funds on deposit with the First National Bank of Atchison, Kan., drew a check upon it for \$350, payable to Maria C. Donald or bearer, which he delivered to the payee. The payee indorsed and delivered the check to C. B. Bennett, who, in turn, indorsed and delivered it to the Commercial Savings Bank of Adrian, Mich. Donald stopped payment of the check before it was presented for payment, and the Michigan bank sued the Kansas bank for the face of the check and interest, claiming it had been accepted in writing, and that it had been purchased for value on the faith of such acceptance. The petition was framed upon the theory that an acceptance is disclosed by the following telegrams:

"Adrian, Mich., Oct. 15, 1903. First National Bank, Atchison, Kansas. Is J. F. Donald's check on you \$350 good? Commercial Savings Bank."

"Atchison, Kas., Oct. 15, 1903. Commercial Savings Bank, Adrian, Mich. J. F. Donald's check is good for sum named. First National Bank."

Of course, there is no dispute that the transaction is governed by sections 547 and 548, Gen. St. 1901, which read as follows:

"No person within this state shall be charged as an acceptor of a bill of exchange, unless his acceptance shall be in writing, signed by himself or his lawful agent. \*

"If such acceptance be written on paper other than the bill, it shall not bind the acceptor, except in favor of a person to whom such acceptance shall have been shown, and who, in faith thereof, shall have received the bill for a valuable consideration." <sup>4</sup>

Neither is there any dispute that the written acceptance contemplated by the statute may be made by telegrams. (7 Cyc. 765.)

The order contained in a check is for payment in money instantly upon demand. No presentation for acceptance and no acceptance is contemplated, as in the case of an ordinary bill of exchange. The bank is under no obligation to do other than pay, and the obligation to pay runs to the maker, and not to the holder. If it refuse to pay when

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\* See N. Y. Neg. Inst. Law, § 220. — C.

<sup>4</sup> See N. Y. Neg. Inst. Law, § 222. — C.

it has funds of the maker in its possession subject to check, the holder has no remedy against the bank. He must look to the maker.

When an ordinary bill of exchange is presented for acceptance, the drawee is under the positive duty of accepting or refusing to accept, and, if acceptance be not plainly negatived by whatever he does, he will be bound as an acceptor, because acceptance is something contemplated by the bill itself. A request upon a bank that it accept a check is a request for the creation of a legal relation between the holder and the bank, wholly without and beyond the purview of the paper. If such relation be established, it imposes upon the bank a liability to a party to whom it was not before bound at all, and it converts the privilege of the bank to pay if in funds into an absolute and unconditional duty to pay, no matter what may be the state of the depositor's account. Any one claiming to be the beneficiary of a contract of this kind independent of and collateral to the check must clearly show that the bank intended to make it.

Neither law nor custom binds parties to the use of any set formula in arranging an acceptance. They may choose their own words. Brevity is not simply allowable, it is commendable; but in all cases there must be no doubt that an absolute promise to pay was made. If the transaction involve two writings, a proposition and a response, they should be construed together. The true principle governing the interpretation of communications like the telegrams between the parties to this suit was grasped and stated in the case of *Rees v. Warrick*, 2 Barn. & Ald. 113. In that case the drawer wrote to the drawee as follows: "Yesterday we valued upon you, favor W. Johnson and Co. two months for 100 l. which please to honor." The drawee replied: "Your bill 100 l. to W. Johnson and Co. shall have attention." It was held by Abbott, C. J., that, to make a letter an acceptance, it ought to be in terms which admit of no doubt; that the phrase "shall have attention" is at least ambiguous; that it may mean the drawee would examine and inquire into the state of the drawer's account for the purpose of ascertaining whether or not the bill would be accepted; and that, unless the words used import a clear and unequivocal acceptance, no recovery may be had. Holroyd, J., said: "The very circumstance that it has been so often lamented that anything short of a written acceptance on the face of the bill should be held to make a party liable as acceptor shows the inconvenience that arises from the great uncertainty which is thereby introduced. In this case the words contended to be an acceptance are that the bill 'shall meet attention.' The defendant does not say, as in *Wynne v. Raikes*, that the bill 'shall be paid and accepted;' but, in fact, only that he will attend to it. Consistently, then, with these words it might depend on the state of the account between them, whether he would accept the bill or not."

Tested by this rule, the defendant's telegram does not express an

acceptance. The inquiry indicates no clear intention to extract from the bank a new contract to pay independent of its duty to Donald. It is entirely consistent with the expression of a simple desire for information relating to Donald's standing at the bank. It fairly means: "Is J. F. Donald's account with you sufficient to make his check for \$350 good?" The answer is strictly responsive to the inquiry. It indicates no clear intention to make Donald's check good whenever presented and whatever the condition of his account. It is entirely consistent with the simple purpose to state Donald's standing at the bank on the day of the telegram. It fairly means: "Donald's account is now sufficient to meet a check for the sum named." The writings are not equal to the unambiguous and unequivocal, "Will you pay?" and "We will pay."

Other cases recognize the principle here applied. In the case of *Kahn, Jr. v. Walton*, 46 Ohio St. 195,<sup>6</sup> the inquiry was: "Are M. A. Walton's checks for \$2,000 good?" The answer was: "Yes, sir." The court, in denying that an acceptance was disclosed, said: "The telegraphic correspondence between the bank and Kahn's agent amounted to no more than an assurance that valid checks to the amount stated, drawn by Walton, or that might be drawn by him, were then good. No particular checks were mentioned in the inquiry, nor any intimation given that the inquirer had received, or was about to receive, such checks; nor had the bank any means of identifying the checks to which the inquiry related. Its telegrams, therefore, did not commit the bank to the payment of any particular check. At most it was information that Walton had, at its date, money on deposit to the amount stated, subject to check."

In the case of *Cook v. Baldwin*, (120 Mass. 317), it was held that the words, "I take notice of the above," written upon a bill of exchange and signed by the drawee, do not of themselves necessarily import an acceptance.

In the case of *Myers v. Union National Bank*, 27 Ill. App. 254, the inquiry was: "Will drafts for thirty-eight hundred dollars, made by J. R. Snyder on you, be paid if presented Monday?" The answer was: "Drafts named are good now." [Held, no acceptance.]

These authorities are sufficient to illustrate the rule that the drawee of a bank check cannot be held liable upon a claimed contract of acceptance external to the bill, unless the language used clearly and unequivocally import an absolute promise to pay.

The decision in the case of *Garretson v. North Atchison Bank* (C. C.) 39 Fed. 163, relied upon by counsel for plaintiff, was affirmed by the Circuit Court of Appeals [51 Fed. 168], upon the identical principle discussed above. The telegrams in that case were as follows:

"Will you pay James Tate's check on you, twenty-two thousand dollars? Answer."

"James Tate is good. Send on your paper."

The court said: "The question put to the bank was wholly free from ambiguity. It was clear, direct and pointed — 'Will you pay James Tate's check on you twenty-two thousand dollars? Answer.' There can be no doubt that it was Streeter's purpose in sending this telegram to ascertain whether the bank would bind itself to pay the check in case he took it in payment for the cattle to be delivered to Tate. Can there be any doubt that the bank must have understood the purpose and meaning of the dispatch thus addressed to it?" [Held, an acceptance.]

The judgment against the defendant bank is reversed, and the cause remanded, with instruction to sustain its demurrer to the petition. All the justices concurring. <sup>5</sup>

### 3. PROMISE TO ACCEPT MUST BE IN WRITING, ETC.

#### § 223

#### BANK OF MICHIGAN *v.* ELY.

17 WENDELL (N. Y.) 508. — 1837.

ACTION of assumpsit against defendant as acceptor. Defendant wrote his agents: "If you want more funds, you can make drafts on me payable at the office of A. S. Marvin & Co., N. York, due in August next. \* \* \* I have authorized Mr. D. D. Hatch to accept these drafts for me." The agents wrote plaintiff communicating the contents of defendant's letter, and subsequently transmitted bills drawn on defendant, which plaintiff discounted and passed to the drawer's credit. There was no evidence that defendant's letter was ever shown to plaintiff. Referees' report for defendant.

*By the Court*, NELSON, CH. J. — It is objected that the acceptance of the defendant, under the circumstances of the case, is not within the provisions of the Revised Statutes, however obligatory it may be upon the principles of the commercial law. The provisions of the statute, 1 R. S. 768, are as follows:

§ 6. No person within this state shall be charged, as an acceptor on a bill of exchange, unless his acceptance shall be in writing signed by himself or his lawful agent.

§ 7. If such acceptance be written on a paper other than the bill, it shall not bind the acceptor except in favor of a person to whom such acceptance shall have been shown, and who, on the faith thereof, shall have received the bill for a valuable consideration. <sup>4</sup>

§ 8. An unconditional promise, in writing, to accept a bill before it is drawn, shall be deemed an actual acceptance in favor of every

<sup>5</sup> This case is reported with notes in 118 Am. St. Rep. 340, and in 11 A. & E. Ann. Cas. 281. — C.

<sup>4</sup> Re-enacted in substance in Neg. Inst. L., § 222. — H.

person who, upon the faith thereof, shall have received the bill for a valuable consideration.<sup>5</sup>

A brief recurrence to the law as it stood in this state before the adoption of these provisions, will aid in comprehending their object and effect. It was settled, (1) that a parol promise to accept a bill already drawn, was valid and binding, and amounted to an actual acceptance; and (2) that a parol promise to accept a future bill, or one not in existence, was not binding, unless the bill was taken by the holder upon the faith and credit of such promise. If it was so taken, then it was binding and amounted to an actual acceptance according to some of the cases. (1 Holt, 181; 2 Kent's Comm. 85; 12 Wendell, 598.) There are other authorities which require the promise to be in writing. Now by the Revised Statutes, no person, within this state, can be charged as an acceptor of a bill, unless the acceptance be in writing, signed by himself or his agent; and if such acceptance be in writing, but not on the bill, still the party is not charged, unless the fact be disclosed to the person taking it, and he on the faith of such acceptance, pay a valuable consideration for the same. The acceptance here referred to relates to a bill already drawn.

By § 8, an unqualified promise in writing to accept a bill to be there-after drawn, is deemed an actual acceptance in favor of any one who, upon the faith of such promise, takes it for a valuable consideration. There is some difference in the phraseology of § 7 and § 8, in respect to the circumstances under which the credit is to be given to the promise to accept. The language of the former, is "in favor of a person to whom such acceptance shall have been shown, and who on the faith thereof," etc., whereas, the 8th section contains only the latter branch of the sentence; the other was in the section as reported by the revisers, but was subsequently stricken out. No reason can be perceived for a distinction in this respect between the two cases, and we do not believe that any was intended by the legislature; and that the difference in the phraseology is altogether accidental. It can be of no possible consequence to the acceptors in what mode the holder comes to the knowledge of the acceptance, whether by inspection or by oral communication; it is a matter that can only concern the latter. If he acts upon the representation of a third person, he incurs the risk of being imposed upon, as he must, as to the genuineness of the writing upon an inspection. The language, "shall have been shown," means nothing more than to express the idea that the holder must know of the acceptance; this is, indeed, the only effect of it. All this is undoubtedly implied in the next sentence, and the clause, therefore, might as well have been omitted altogether, as it is in the next section.

In *Pierson v. Dunlop* (Cowper, 571), the first case in which this

<sup>5</sup> Re-enacted in substance in Neg. Inst. L., § 223. — H.

doctrine is stated, Lord Mansfield remarked: "It has been truly said, as a general rule, that the mere answer of a merchant to the drawer of a bill, saying he will duly honor it, is no acceptance, unless accompanied with circumstances which may induce a third person to take the bill by indorsement; but if there are any such circumstances it may amount to an acceptance," etc. In *Mason v. Hunt*, (Doug. 299), Lord Mansfield used language from which, probably, the phraseology of the statute was taken; but it is manifest he intended to do no more than repeat the principle he had before stated in *Pierson v. Dunlop*. In *Clark v. Cock* (4 East, 57), this very objection was taken by Gibbs, (p. 67), namely, that the letter, itself, ought to have been shown, and not merely the purport of it given; but it was disregarded by all the judges. The communication of the fact of the promise, was deemed the material circumstance.

Now it must be conceded in this case, that the promise to accept is in writing, and, in my judgment, it is an unqualified promise. "If you want more funds, you can make draft on me, etc., to the amount of \$10,000." Who was to determine whether more funds were wanted? Undoubtedly, Beach & Hudson. The question was referred to their sole discretion; and when decided and the drafts drawn, the obligation to accept became imperative. As the discretion to draw was thus left solely with them, the terms of the letter are equivalent to an absolute promise to accept whenever they drew upon him in the manner specified. It is not for him to set up an abuse of this discretion to avoid the obligation, unless it be brought home to the plaintiffs, of which there is no pretence.

Did the plaintiffs receive the bills upon the faith of the defendant's promise to accept them, and for a valuable consideration? It must be conceded, that most, if not all, the money now relied on as the consideration for these bills, was actually received by the agents, and therefore paid to them by the bank, before the written authority to draw, and promise to accept was given; and hence, it cannot be said, strictly speaking, that it was advanced upon the faith of this promise. So much must be admitted. But as we have already shown, the agents possessed authority to raise funds for the purchase of the wheat upon the defendant's paper, and in this case, no doubt could be entertained of his liability as drawer, if he had been so charged. It is true, that regularly, the drafts should have been drawn in the name of the principal, but Hudson's practice was uniformly otherwise, and was sanctioned by the defendant. He cannot be permitted to avail himself of that objection. It may then be confidently said, that the money when taken from the packages by Hudson operated as a loan to, or charge upon, Ely, the principal; that the debt was his, and if no drafts had been given he would have been holden to discharge it, upon the plainest law applicable to the

relation of principal and agent. Now, assuming the advance to have stood on this footing on the 18th January, when the written authority to draw the bill was given, and the drafts in question were subsequently drawn; is not the taking of them by the plaintiff for this debt, a taking upon the faith of the promise to accept and for a valuable consideration? A man's own debt or account owing by him is certainly a good consideration for the draft of his authorized agent, and there can be no doubt of the fact that the paper was received on the credit of the engagement of Ely to accept, or which is the same thing, in judgment of law, upon the authority to draw upon him.' Here, then, are the three ingredients required by the statute: 1. A written promise to accept; 2. Taking the drafts upon the faith of it; and 3. A valuable consideration, to wit, the debt existing against the defendant, created by an agent with full authority.

It is to be regretted the attorney had not inserted the common counts in his declaration, and then the question upon the statute might have been avoided; the defendant would have been charged as drawer of the drafts in question.

Prudence would, perhaps, require that the pleadings should be amended in this particular.

Motion to set aside the report of referees granted; costs to abide the event.<sup>6</sup>

<sup>6</sup> See also *Exchange Bank v. Hubbard*, 62 Fed. Rep. 112.

**VIRTUAL ACCEPTANCES.** — An unconditional written promise to accept a bill to be thereafter drawn is binding in favor of holders in due course who take the bill upon the faith of the promise. *Coolidge v. Payson*, 2 Wheat. (U. S.) 66; 1 Daniel on Neg. Inst., §§ 551, 560; 4 Am. & Eng. Encyc. L. (2d ed.), pp. 233-245. But the promise must be unconditional. *Merchants' Bank v. Griswold*, 72 N. Y. 472; *Germania N. B. v. Taaks*, 101 N. Y. 442; *Bank v. Recknagle*, 109 N. Y. The promise must be in writing. *Johnson v. Clark*, 39 N. Y. 216 (telegraphic promise sufficient); 1 Daniel, § 556. The promise must describe the bill in unequivocal terms. *Boyce v. Edwards*, 4 Peters (U. S.) 111; *Franklin Bank v. Lynch*, 52 Md. 270 (cf. *Flora First N. B. v. Clark*, 61 Md. 400); *Ulster Co. Bank v. McFarlan*, 5 Hill (N. Y.) 432; 3 Den. 553; 1 Daniel, § 560, 561. The bill must follow the terms of the promise. *Lindley v. First N. B.*, 76 Iowa, 629; *Brinkman v. Hunter*, 73 Mo. 172; 4 Am. & Eng. Encyc. L. (2d ed.), p. 243. The bill must be drawn within a reasonable time after the giving of the promise. *First N. B. v. Bensley*, 2 Fed. R. 609; 1 Daniel, § 560. Cf. *Johnson v. Clark*, 39 N. Y. 216. The bill must be taken by the holder upon the faith of the promise. *M'Evers v. Mason*, 10 Johns. (N. Y.) 207; *Exchange Bank v. Rice*, 98 Mass. 288. — H.

[See also *Bank of Morganton v. Hay*, 143 N. C. 326. — C.]



## 4. ACCEPTANCE BY REFUSAL TO RETURN THE BILL.

§ 225

MATTESON *v.* MOULTON.11 HUN (N. Y.) 268. — 1877.<sup>7</sup>

ACTION against defendant as acceptor. Judgment for plaintiff.

TALCOTT, J. — This is a motion for a new trial on a verdict directed by the court at the Cattaraugus Circuit. Exceptions sent to the General Term in the first instance.

The action was upon an inland bill of exchange, drawn by one McDonald on the defendant for \$526.76. The bill was never accepted by the defendant in writing, as required by the statute, which provides that no person within this state shall be charged as an acceptor on a bill of exchange unless his acceptance shall be in writing, signed by himself or his lawful agent. (1 R. S., 2d. ed., 757, § 6); and unless he is made liable as an acceptor under the subsequent eleventh section, he is not liable upon the bill. The said section 11 is as follows:

“Every person upon whom a bill of exchange is drawn, and to whom the same is delivered for acceptance, who shall destroy such bill, or refuse within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill accepted or non-accepted to the holder, shall be deemed to have accepted the same.”

The bill was sent by a third party with directions to leave it at the office of the defendant, which was done, and, so far as appears, no demand of acceptance was ever made. The defendant did not destroy the bill, for he produced it on the trial. The defendant never refused to return the bill; in fact, he was not directly required to return it, and no direct demand of the bill was ever made upon him. Two days after the making of the bill and the delivery of it to his agent at his office, the plaintiff called at the office and ascertained that the bill had been left there, and was informed by the agent that they were hard up and would not pay that day, but received no promise that the bill should be paid at any future day. The plaintiff went away and left the bill unaccepted at the office of the defendant. Two or three days after this, the plaintiff met the defendant at the hotel, in the same place in which the office of the defendant, before spoken of, was located, and had a conversation with the defendant about the bill, informing the defendant that he (the plaintiff) had such a bill and that it was at defendant's office. The following conversation, as testified to by the plaintiff, then ensued between the parties:

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<sup>7</sup> Affirmed 79 N. Y. 627. — H.

"I wanted to know whether he was going to pay it or not, and if not, I wanted the order; and he (the defendant) said he could not pay it then, but as soon as he had completed five miles of the railroad running into Jamestown, he should have the money. I asked him how long that would be, and he said ten days or two weeks. I told him it was considerable of an amount, and I wanted to know whether I should get my pay on it or not. He said I would get my pay on it inside of two weeks. I told him I wanted my pay on the order, and he said I would get my pay on the order as soon as he completed five miles of the railroad. Buffalo city was going to pay him, and that he would get done inside of two weeks." This conversation occurred in June, and it does not appear that anything else took place between the parties until the sixth day of October, when they again met, and the plaintiff asked the defendant about pay on the bill, and the defendant stated that "he had been disappointed about pay." The plaintiff also stated that the defendant never returned the bill or offered to return it.

We do not think that the evidence established a refusal to return the bill, within the eleventh section of the statute above referred to. The refusal mentioned in the statute, as it seems to us, refers to something of a tortious character, implying an unauthorized conversion of the bill by the drawee. In this case it is obvious that the plaintiff willingly left the bill in the possession of the defendant, and in no way gave the defendant to understand that a redelivery of the bill was required, relying probably upon the expectation that it would be ultimately paid. The attempt to charge the defendant with the payment of the bill upon the ground of a promise is, as it appears to us, simply an attempt to charge the defendant with a liability on the bill upon a parol acceptance. If an action can be maintained under such circumstances, the provisions of section 6 of the statute before referred to would be rendered wholly nugatory.

Besides, as to the promise, there was no evidence to show that the five miles of railroad, on the completion of which the promise to pay the bill was conditioned, had been completed.

The defendant moved for a nonsuit on the ground: First. That there was no acceptance of the bill in writing. Second. That there was no demand of the bill before suit. Third. That there was no refusal to deliver the bill. Fourth. That the plaintiff had failed to make out a cause of action. The court held that the defendant was liable because he was indebted to McDonald, the drawer, because he had received and retained, and declined to return the bill, and had promised to pay it; to which ruling and to the refusal of a nonsuit the defendant excepted. We think the nonsuit should have been granted for the reasons stated by the defendant. \* \* \*

The verdict is set aside and a new trial ordered, costs to abide the event.<sup>8</sup>

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### WISNER v. FIRST NATIONAL BANK.

220 PENNSYLVANIA STATE, 21. — 1908.

MESTREZAT, J. Samuel R. Bullock drew six checks on the defendant bank in favor of Charles W. Gallae, Jr., who deposited them in plaintiff bank in New York city, which credited them to his account in that bank. The first check is dated December 27, 1904, and the last January 3, 1905. The plaintiff sent these checks for collection to the defendant bank, two of them through the First National Bank of Altoona, Pa., and the remaining four through the Farmers' Deposit National Bank of Pittsburgh. On the day they were received the defendant bank handed the several checks to a notary public usually employed by it for the purpose of protest, and he held the checks without protesting them or giving notice of dishonor. On January 9, 1905, some days after the checks had been delivered to the notary, the cashier of the Altoona bank went to Gallitzin, obtained the checks from the notary, took them to the Gallitzin bank, whose cashier gave the cashier of the Altoona bank a letter to a notary public in Altoona inclosing five of the Bullock checks with the request that they be protested for want of sufficient funds in the Gallitzin bank to pay them. One of the two checks sent by the Altoona bank to the defendant bank was returned to the former bank on the same day. It was conceded by the plaintiff on the trial below that there could be no recovery for this check. The other check sent by the Altoona bank and the four checks sent by the Pittsburgh bank to the defendant bank were not returned by the defendant to the collecting banks for more than two days after their delivery to the latter bank. With the one exception, the Bullock checks were not returned to the defendant bank by the notary public to whom they were delivered for protest within 24 hours after their receipt from the transmitting bank. The checks therefore, with the one exception, were not returned to the collecting banks within 24

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<sup>8</sup> See also *Holbrook v. Payne*, 151 Mass. 383, *ante*, p. 644; *Overman v. Hoboken City Bank*, 31 N. J. L. 563; *Colorado N. B. v. Boettcher*, 5 Colo. 185; *Jeune v. Ward*, 1 B. & Ald. 653.

The drawer has twenty-four hours in which to decide whether to accept or not, if presentment is made before the day of maturity. *Montgomery County Bank v. Albany City Bank*, 8 Barb. (N. Y.) 396; 1 Daniel, § 492. — H.

[*Matteson v. Moulton*, 11 Hun (N. Y.) 268, is followed in *St. Louis S. W. Ry. Co. v. James*, 78 Ark. 490, in construing a similar statutory enactment in Arkansas. This case is reported in 8 A. & E. Ann. Cas. 611, with note entitled "Retention of, or refusal to return, bill of exchange as acceptance thereof." — C.]

hours after their delivery to the drawee bank, the defendant in this action.

This is an action of assumpsit brought by the plaintiff, the holder of the checks, to recover the amount of the checks on the ground that the drawee bank, the defendant, had accepted the checks by its refusal and failure to return them within 24 hours after their receipt, as required by section 137<sup>9</sup> of the Act of Assembly of May 16, 1901 (P. L. 213; 3 Purd. Dig. [13th Ed.] p. 3250), known as the "Negotiable Instruments Law." The defendant claims that it is relieved from liability on the checks because it had refused to accept them, and had on the day of their receipt delivered them to a notary public for protest and dishonor. The learned trial judge was of the opinion, and so instructed the jury, that the defendant had not by its conduct "relieved itself from the presumption that it had accepted these checks by any evidence which it had produced in the case," and that the verdict should be for the plaintiff for the amount of the five checks. Subsequently the court, on motion of defendant's counsel, entered judgment for the defendant *non obstante veredicto* on the entire record. The learned court in its opinion entering judgment for the defendant held that under the Negotiable Instruments Law it was necessary for the holder, in order to recover against the drawee bank, to prove a conversion of the checks, and that the mere retention of them for more than 24 hours, without a demand for their return, is not a refusal within the meaning of the statute. The plaintiff has taken this appeal. \* \* \*

We come now to the principal and controlling question in the case, and that is whether the failure to return the checks to the holder or the collecting bank within 24 hours after their delivery to the defendant was a refusal to return the checks within the meaning of section 137 of the act; or does the act contemplate a tortious refusal to return, amounting to a conversion of the checks, as claimed by the defendant and as held by the court below?

The drawee to whom a bill is delivered for acceptance is deemed or taken to have accepted it under this section of the act (a) where he destroys it; (b) where he refuses within 24 hours after delivery to return the bill accepted or nonaccepted to the holder; and (c) where he refuses within such other period as the holder may allow to return the bill accepted or nonaccepted to the holder. When either of these conditions exists, the drawee becomes an acceptor of the bill, and assumes liability as such. An implied or a verbal acceptance of a bill is abolished by the act and there are now only two modes of accepting a bill: (1) By writing, signed by the drawee, as provided in section 132;<sup>1</sup> and (2) by a nonreturn of the bill, which is

<sup>9</sup> N. Y., § 225. — C.

<sup>1</sup> N. Y., § 220. — C.

declared by the section under consideration to be the equivalent of an acceptance.

The manifest purpose in requiring the prompt return of the bill is in the interest of and for the protection of the holder. It is immaterial to the drawer when the bill is returned, as he is protected by notice of dishonor; and hence this section of the act requiring prompt action in returning the bill was obviously enacted for the benefit of the holder of the bill. The act declares in section 136<sup>2</sup> that 24 hours is sufficient time for the drawee to decide whether or not he will accept the bill, and the section under consideration, having allowed this time, it requires him to return the bill accepted or non-accepted. If a demand and refusal are conditions precedent to an acceptance under this section, then the holder must not only present the bill for acceptance, but he must make a demand for its acceptance, and await a specific refusal before the drawee is deemed an acceptor. This would certainly not be to the convenience or the interest of the holder, but in direct opposition to both. It would afford the holder less protection, and would in effect prevent the return of the bill within 24 hours; or it would require the holder in transmitting the bill with instructions to present it for acceptance to send at the same time a demand for its acceptance. It is obvious that such demand accompanying a presentation of a bill for acceptance is wholly unnecessary, and certainly was not in contemplation of the legislature in enacting the section.

The presentation of a bill for acceptance is a demand for its acceptance, which, if the bill is retained by the drawee, implies a demand for its return if acceptance is declined, in contemplation of the Negotiable Instruments Law. The purpose of presenting a bill of exchange to the drawee is to require him to accept and assume liability for its payment, or to refuse its acceptance, and thereby avoid liability. When the bill is presented, action by the drawee is therefore demanded of him, and he cannot remain silent and inactive without incurring the statutory penalty prescribed for such conduct. If he is permitted to retain the bill, he must return it accepted or not accepted at the expiration of 24 hours. If he accepts, he is required to do so in writing, and must return the bill. If he refuses, he must return the bill not accepted. If he fails to do either — return it accepted or not accepted — he is “deemed to have accepted the bill” under this section of the act, and is liable thereon to the holder. It is apparent, we think, that in the enactment of this section of the statute the legislature regarded the presentation for acceptance as a demand for an acceptance, which, when the bill is retained by the drawee, implies a demand for its return within the time specified, and that, therefore, the neglect or failure to return is a refusal to return

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<sup>2</sup> N. Y., § 224. — C.

the bill. As said by this court in *First National Bank of Northumberland v. McMichael*, *supra*, if a bank does not pay or accept a check, it is bound to refuse it. And this is more clearly disclosed as the true interpretation of the word "refuses" in this connection, when we consider that the consequences to the holder of the nonreturn of the bill are the same whether it follows a demand, additional to the presentation for acceptance and a refusal, or simply a neglect or failure to return after the demand implied by its presentation for acceptance. If the section has in view the protection of the holder as it manifestly has, then it was evidently the intention of the legislature that the nonreturn of the bill within the specified time, regardless of the cause, will make the drawee an acceptor.

The law merchant discourages laches in parties to negotiable paper, and demands prompt action in the performance of the duties imposed upon them. It was not the intention of the legislature in the enactment of the Negotiable Instruments Law to abolish this rule, and to encourage delay or inaction in the holder or drawee of such paper. The intention of the section in question was to expedite action by the drawee in accepting or refusing a bill presented and retained by him, and to fix a definite time, which had previously been uncertain, in which he should act on the bill. He is granted 24 hours after delivery, and not after a demand for a return of the bill, in which he must accept or decline to honor it. The time for returning the bill to the holder does not begin to run from the demand for its return, but from the date of its delivery. The drawee must, therefore, act within 24 hours from the date of the delivery of the bill, whether his action be an acceptance or a refusal. The section gives no other alternative, and makes no other provision either for failure or neglect. Hence, action being required of the drawee, and one of the two alternatives being open to him, if he does not accept and return the bill, it will be deemed accepted if the bill by his default remains in his hands beyond the time limit. He refuses to return the bill in contemplation of the act when for any cause within the drawee's control it is not sent to the holder in the specified time. There can be no reason, and we will not assume that the legislature intended to do an unreasonable thing, why the law should make a distinction between the nonreturn of the bill by the refusal to return after a specific demand and the failure or neglect to return after a demand implied by presenting the bill for acceptance. If such should be the proper interpretation of the section and a formal demand be necessary, then there is no provision in any part of the entire act imposing a penalty for the default or neglect of the drawee to return the bill, although the consequences of such act on the part of the drawee are as prejudicial to the holder as if a refusal to return the bill had followed a prior specific demand. There is, however, no such *casus omissus* in the act; but the enforce-

ment of the return of the bill, accepted or nonaccepted, within the time designated, being the primal object of the section, the cause of its detention is wholly immaterial, and cannot affect the drawee's liability as an acceptor.

The construction we place on section 137 is necessary to protect the holder of checks and other negotiable paper, it furnishes a complete statutory remedy for any default of the drawee in acting on the paper when retained by him, and does no violence to the language employed in the section. It carries out the obvious intent of the legislative mind in the enactment of the section, and establishes a fixed and certain rule to govern the drawee and the holder in the former's action on negotiable paper presented to and retained by him.

Our interpretation of the statute coincides with the legislative construction placed upon a similar statute in the state of Wisconsin. In enacting a Negotiable Instruments Law the legislature of that state added to a section of it similar to section 137 of our act a proviso "that the mere retention of the drawee will not amount to an acceptance." \* The logical inference is that the mere retention of the bill would be an acceptance within the meaning of the language of our statute which contains no such proviso.

It is not accurate to say, as suggested by the appellee, that under the Negotiable Instruments Law a bill can only be accepted by writing signed by the drawee. It is true that verbal and implied acceptances have been abolished by section 132, which provides that the acceptance must be in writing and signed by the drawee. But section 137, involved in this case, declares that the action of the drawee in destroying a bill or in not returning it, as required by the section, shall be deemed an acceptance of it. A constructive acceptance of a bill under this section is as effective to charge the drawee as an acceptance in writing under section 132. Nor do the two sections in any way conflict. The former section requires affirmative action on the part of the drawee by assuming liability by a writing. The latter section declares his liability if he destroys the bill, or if by inaction he retain the bill beyond the specified time. An acceptance under either section obligates the drawee to pay the bill.

In the state of New York a Negotiable Instruments Law has been enacted, and a section similar to section 137 of our act is included in the statute. The Supreme Court of that state in *State Bank v. Weiss*, 46 Misc. Rep. 93, has construed this section of the statute in conformity with the meaning we have given our own act. The case was decided in 1904, and it does not appear to have been carried to the Court of Appeals of the state. *Matteson v. Moulton*, 79 N. Y. 627, relied upon by the court below and the appellee here, was decided by

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\* The actual wording of this addition to the Wisconsin statute is simply: "Mere retention of the bill is not acceptance." — C.

the Court of Appeals in 1880, and the syllabus of the case states that the court held that "refusal" in the New York statute is "an affirmative act, or is made up of conduct tantamount to one, [and] it is also a willful or wrongful act." But the facts of the case did not require the court to determine whether the failure or neglect to return the bill within 24 hours was a refusal to return it within the meaning of the act. The bill was sent to the office of the defendant, who retained it for three or four months with the consent of the plaintiff, and under a promise to pay, relied on by the plaintiff. It will therefore be observed that the facts of the case did not require the court to determine whether the mere retention of a bill of exchange for 24 hours after its delivery to the drawee would constitute an acceptance. Again, if the case is still authority in that state for an interpretation of the act, it is singular that it is not cited or referred to in the very recent case of *State Bank v. Weiss*, *supra*, in which the court gave an interpretation of the same section of the Negotiable Instruments Law of that state diametrically opposite to the construction of the act announced in the Matteson case.

We are of the opinion that, under section 137 of the Negotiable Instruments Law of this state, the failure or neglect of a drawee to whom a bill is delivered for acceptance to return the bill, accepted or non-accepted, to the holder within 24 hours after delivery, makes the drawee an acceptor of the bill. It therefore follows in the case in hand that, the defendant bank having failed to return the five checks to the collecting bank within 24 hours after their delivery to the drawee, the latter must be deemed to have accepted the checks, and is therefore liable to the plaintiff for the amount of them.

The judgment *non obstante veredicto* in favor of the defendant is reversed, and judgment is now directed to be entered by the court below on the verdict in favor of the plaintiff and against the defendant.<sup>3</sup>

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<sup>3</sup> This case is reported in 17 L. N. S. 1266, with note entitled, "Detention of bill of exchange or check by drawee as acceptance."

A note to this case in 8 Col. Law Rev. 508 (June, 1908), says: "Mere retention is clearly not refusal when it is the holder's duty to demand its return. § 225 Neg. Inst. Law has been construed as requiring a tortious refusal, *Matteson v. Moulton*, 79 N. Y. 627, affg. 11 Hun 268; *Dickinson v. Marsh* (1894) 57 Mo. App. 566; *Ry. Co. v. James* (1906) 78 Ark. 490, but retention in the face of a customary dealing or notification that the drawee shall return a bill, or check, § 321, would seem to be a refusal within the meaning of the section. Since banking usage requires prompt return of the check if payment is refused, its retention in the principal case should be sufficient to charge the drawee as acceptor. But, while correct in result, the decision seems erroneous in holding that a non-tortious refusal will so charge the drawee."

Mr. Crawford criticizes the principal case as follows: "It is difficult to see how the statute could apply to such a state of facts. It refers only to



## 5. ACCEPTANCE OF INCOMPLETE OR DISHONORED BILL.

§ 226

HOPPS &amp; CO. v. SAVAGE.

69 MARYLAND, 513. — 1888.

ACTION against defendant as acceptor. Defendant accepted the draft before the drawer (Waddy) signed it. The draft, payable "to order of myself," was then indorsed to plaintiff by Waddy. Plaintiff presented it to defendant who refused to accept or pay it and pointed out that Waddy had not signed it as drawer. Plaintiff then procured Waddy's signature as drawer. Judgment for plaintiff.

MILLER, J. [after stating the facts] delivered the opinion of the court. \* \* \* The material facts are undisputed. Hopps wrote the draft himself, accepted it, and then gave it to Waddy for the

cases where the paper is presented for *acceptance*; but where checks are remitted to the drawee bank, the obvious purpose is to present them for *payment*, and not mere *acceptance*. What the holder desires in such a case, is that the bank shall remit the money, not that it shall return the check with its acceptance placed thereon." *Craw. Neg. Inst. Law*, 3rd ed., p. 156.

An article in 25 *Banking Law Jour.* 638 (August, 1908), discussing the principal case, says: "It seems incorrect, in a way, to apply to checks the section which provides that [quoting § 225.] A check is not presented for acceptance, but for immediate payment; a bank is not obliged to accept or certify a check, only to pay it, and a check cannot be protested for refusal to certify, but only for refusal to pay. The delivery for acceptance provided by this section contemplates bills of exchange other than checks. But the Negotiable Instruments Law defines a check as a bill of exchange drawn on a bank payable on demand, and declares that, except as otherwise provided, the provisions of the act applicable to a bill of exchange payable on demand apply to a check, and the Supreme Court of Pennsylvania says that there is no provision in the act which makes the section in question inapplicable to bank checks presented for payment, and that there is every reason why the section should apply." p. 641.

Section 137 of the Pennsylvania Negotiable Instruments Law [N. Y. § 225] was amended by laws of Pennsylvania, 1909, No. 169, p. 260, by adding the following: "Provided, that the mere retention of such bill by the drawee, unless its return has been demanded, will not amount to an acceptance; and provided further, that the provisions of this section shall not apply to checks." Commenting on this amendment, the Pennsylvania Committee on Uniform State Laws, in its 1909 report to the Pennsylvania Bar Association, says: "As was pointed out by the learned editor of the *Legal Intelligencer* (May 7, 1909), this act was passed probably to overcome the effect of the decision of the Supreme Court in *Wisner v. First National Bank*. . . While, of course, anything that destroys the uniformity of any section of the act, whether by judicial decision or by statute, is to be deplored, it has been said in relation to this particular act, by eminent authority, that in thus changing the law as interpreted by the Supreme Court, the statute but follows the weight of authority in other states, so that substantial uniformity has not been affected." Report of Pa. Bar Ass'n for 1909, p. 136.

express purpose of enabling him to raise money upon it. It is true it was delivered to him before Waddy had signed it as drawer, but there can be no doubt as to the fact that Hopps intended Waddy should sign and negotiate it. In such case the law implies an authority from Hopps to Waddy to sign his name as drawer. Four days after its date, and long before its maturity, Waddy indorsed the draft to Savage, and received from the latter its full face value. That Savage thereby became a *bona fide* holder for value is undeniable. Even if he had then known that, as between Hopps and Waddy, it was without consideration and merely an accommodation bill, his position as such holder would not have been affected by such knowledge. (*Maitland v. Citizens' Nat. Bank of Balto.*, 40 Md. 540.)

It is also true that Waddy's signature was not put to the draft until after Savage had become the holder. In other words, the draft, when indorsed to Savage, was in blank in respect to the drawer's name, but this blank was afterwards filled up in accordance with the intention of the parties when the bill was written and accepted. We are clearly of opinion the law authorized this to be done. In fact the authorities go to the extent of holding that Savage would have been authorized to fill the blank by inserting his own name as drawer. Such was the decision of the Common Pleas Division in *Harvey v. Cane* (34 Law Times, N. S. 64); and in *Scard and Wife v. Jackson*, reported in a note to the same case, it was held that the name of the holder could be thus inserted after the maturity of the bill. (See, also, *Schultz v. Astley*, 2 Bing. N. C. 544.) In the case before us the suit is by a *bona fide* holder for value before maturity, against the acceptor, and the drawer's name was signed in strict accordance with the intention of the parties. We hold that in such a case it makes no difference whether the blank was filled before or after the maturity of the draft.

From these views it follows there was no error of which the appellant is entitled to complain in the rulings of the court upon the instructions, and the judgment must be affirmed.

Judgment affirmed.

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§ 226

STOCKWELL v. BRAMBLE.

3 INDIANA, 428. — 1852.

ACTION against defendant as acceptor of a bill. Judgment for defendant.

Plaintiff offered to prove that defendant stated that he would accept the bill, but did not want it generally known that he was accepting the drawer's bills, and would therefore write "protested"

across the face, which he did and signed his name; that afterward on the same day defendant again promised to pay the bill. This evidence was excluded.

BLACKFORD, J. [after stating the facts]. We think that the parol evidence offered by the plaintiff was admissible, on the ground that it showed a valid acceptance of the bill by the defendant, after he had written on it the word "Protested."

Suppose the word "Protested," as written on the bill, to mean that the defendant refused to accept the bill, and the holder so understood that word; and suppose, also, that evidence of what the defendant said, at the time of such refusal, was objectionable as contradicting the word "Protested," still the subsequent parol acceptance would be good. We know of no reason why the drawee of a bill, who has refused to accept the same, may not afterwards accept it. It frequently happens that a bill, after being protested for non-acceptance, is accepted by a third person *supra* protest. The following case is cited by Mr. Chitty: A foreign bill drawn on defendant was protested for non-acceptance, and returned, and afterward defendant told the plaintiff, "if the bill comes back I will pay it," and this was held a good acceptance. (Chitty on Bills, 316, note l.) It is clear, therefore, that the fact of a bill's having been protested, does not prevent its being afterwards accepted by the drawee.

The acceptance is not objectionable merely because it was by parol. By the law merchant, a bill, whether foreign or inland, may be accepted by parol as well as by writing, (Chitty on Bills, 316); and that is the law here.

PER CURIAM.—The judgment is reversed with costs. Cause remanded.<sup>4</sup>

## II. Kinds of acceptances.

### 1. GENERAL ACCEPTANCE.

#### § 227 MEYER & CO. v. DECROIX, VERLEY ET CIE.

L. R., 1891, APPEAL CASES (H. L.) 520.

ACTION by indorsees against acceptors, upon the following instrument: <sup>5</sup>

<sup>4</sup> "A promise to accept, even after a protest for non-acceptance, is binding; and a promise to accept made after the bill becomes due according to its tenor, amounts to a promise to pay immediately." *Grant v. Shaw*, 16 Mass. 341 (1820). — H.

<sup>5</sup> In fac-simile in 59 L. J. Q. B. 539. — H.

ROUBAIX, Sept. 12th, 1889.

No. 501. £778 4s. 2d.

On Oct. 31st after date pay to ——— order <sup>6</sup> Mr. L. Delobbel Flipo seven hundred and seventy-eight pounds 4s. 2d. Value received.

L. DELOBBEL FLIPO.

To Messrs. H. MEYER & Co., Limited,  
London, Eng.

[Across the face was written and stamped:]

In favor of Mr. L. Delobbel Flipo only.

No. 28.

Accepted payable at Alliance Bank, London, for H. Meyer & Co., Limited.  
B. MANNING, ARTHUR MANNING, *Directors*. ARTHUR MANNING, *Secretary*.

The word "order" in the bill was struck out, but when or by whom did not appear.

Plaintiffs, bankers at Lille, in France, discounted the bill for Flipo. They did not understand English and their attention was not called to the form of the acceptance until after the dishonor of the bill by the Alliance Bank.

The Divisional Court (Cave and A. L. Smith, JJ.) held the acceptance was a qualified one, rendering the bill non-negotiable, and gave judgment for defendants. The Court of Appeal (Lord Esher, M. R., Lindley and Bowen, L. JJ.) reversed that decision and entered judgment for the plaintiffs.<sup>7</sup> Defendants appeal.

LORD HERSCHELL. — My Lords, the respondents in this case seek to recover from the appellants the amount of a bill of exchange accepted by them. The defense set up is that the acceptance was a qualified one, and restricted the right to require payment to the payee alone, and that the acceptors are therefore under no obligation to the respondents who took by indorsement from him.

It was not disputed at the bar that the acceptor of a bill of exchange may make his acceptance a qualified one. If he do so, the drawer may, of course, refuse to take such an acceptance, and treat the bill as dishonored: but if he takes the bill, the obligation of the acceptor is not absolute, but subject to the qualification which he has introduced. I think, further, that it is beyond dispute that if an acceptor seeks to qualify his acceptance, and thus to modify the obligations which an acceptance ordinarily imposes, he must do so on the face of the bill in clear and unequivocal terms, and in such a manner that any person taking the bill, if he acted reasonably, could not fail to understand that it was accepted subject to an expressed qualification.

About these propositions I do not think there can be any difference of opinion; the difficulty lies in applying them to the facts of the

<sup>6</sup> This word was struck out by a pen mark. By the provisions of the Bills of Exchange Act (§ 8, subsec. 4) the words "order" or "bearer" are not necessary to render a bill negotiable. — H.

<sup>7</sup> See 59 L. J. Q. B. 539; L. R. 25 Q. B. D. 343. — H.

particular case. The bill in question was drawn in France by a person named Delobbel Flipo upon the appellants, and forwarded to London for their acceptance. The bill is drawn on a printed form containing the word "order" immediately preceding the name of Delobbel Flipo, which has been inserted as the payee of the bill. This word "order" has been erased, but by whom does not appear, nor do I think it material. If, as suggested, it was done by the acceptors, they were not justified in making the erasure, and in any case there would be nothing to show a person taking the bill that the word had not been struck out by the drawer at the time he inserted the name of the payee. I do not think, therefore, that the erasure of the word "order" can in any way assist the contention that the acceptance was a qualified one. That must be determined by a consideration of the effect of the words written across the bill by the acceptors.

For the purpose of accepting the bill the appellant company impressed upon it by means of a stamp the words "accepted payable at Alliance Bank, London," underneath which the signatures of two directors and the secretary were written. The acceptors wrote across the bill above the word "accepted" the words "In favor of Mr. L. Delobbel Flipo only:" between these words and the word "accepted" was written "No. 28." In considering whether the effect of the words "In favor of Mr. L. Delobbel Flipo only" was to make the acceptance a qualified one in the manner suggested, regard must be had both to the words used and to the situation in which they are placed. It may be that if the same words had been found in the body of the acceptance following the word "accepted," they would have amounted to the qualification contended for. The presence of any words in the body of the acceptance would of itself suggest the idea that some qualification of it was intended; but where the words are not inserted in the body of the acceptance, I do not think the same impression is likely to be produced, though the words may, of course, be so clearly intended to qualify the acceptance and so incapable of any other reasonable construction that they would be as effectual for the purpose. But in the present case the words written above the acceptance are not "Payable to Delobbel Flipo only," which is the meaning sought to be attached to them, but "In favor of Delobbel Flipo only," which do not seem to me necessarily to bear the same meaning. The words "in favor of," when used in relation to a bill of exchange, do not ordinarily mean that it is payable only to the person in whose favor it is said to be drawn; the words are equally applied when the bill is made payable to his order. The words "In favor of," therefore, are properly paraphrased by "payable to, or to the order of;" but then it is said that the insertion of the word "only" after Flipo's name would show that this could not be the meaning intended. It must be remembered, however, that between these words and the ac-

ceptance "No. 28" was inserted, which separates the words which it is suggested qualify the acceptance from the acceptance itself.

Under these circumstances I do not think that it is impossible that a person taking the acceptance by way of indorsement might suppose that these words "In favor of Delobbel Flipo only" were, like the "No. 28," a mere memorandum inserted by a party to the bill, and not intended to affect the acceptance. It might be supposed to indicate that it was the 28th bill, or No. 28 of the bills accepted "in favor of Delobbel Flipo only," as distinguished from bills accepted in favor of Flipo and some other persons. I do not say that this would be the interpretation given to it by a person who carefully and critically considered it. But that is not the question. It is impossible, as I have said, to disassociate the words used from the position and collocation in which they are found, and if these be such as to suggest that the words are a mere memorandum, a person taking the bill, even if he exercised the ordinary care to be expected in such transactions, would not be likely to examine or weigh them with the same care as if they were found in the body of the acceptance.

In my opinion the qualification was not made in clear and unequivocal terms, and in such a manner that any person taking the bill, if he acted reasonably, could not fail to understand that it was accepted subject to that qualification. I think, therefore, the judgment ought to be affirmed.<sup>8</sup>

LORD BRAMWELL. — My Lords, I consider what was written and printed by the defendants on the face of the bill as one — one thing only — an acceptance and no more, not an acceptance and something else. That being so, I am unable to see any difference between "In favor of Flipo only, accepted payable," etc., and "Accepted in favor of Flipo only, payable," etc. I do not know where the *body* of the acceptance begins, unless at the beginning of what is written. It is said that "In favor of Flipo only" does not necessarily mean the same as "accepted in favor of Flipo only." I think it does; but if not necessarily, what does it naturally mean? Especially when it is remembered that the word "order" was erased. That was no doubt unauthorized, if done by the drawees, but it clearly shows the intention of the drawees if done by them, and the knowledge by the drawer of that intention if done by him. The striking out of "order" was not a memorandum for the use of the drawees. I cannot find that any other cause for what was done can be suggested.

As to the thing being clear and unequivocal, I begin to doubt if there is such a thing, but it is enough if words are intelligible. Can there be a doubt that this bill might have been protested for non-

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<sup>8</sup> Opinions for affirmance were also delivered by Lord Halsbury, L. C., and Lord Watson. — H.

acceptance according to its tenor? I suppose from the form of the acceptance that the appellants thought they had, or might have, some cross-claim against Flipo. Flipo, probably, was glad to get anything from them, and so put up with the acceptance, and perhaps indorsed it in satisfaction of a bad debt to those glad to get anything from him.<sup>9</sup>

Order appealed from affirmed, and appeal dismissed with costs.

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§ 228

TROY CITY BANK v. LAUMAN.

19 NEW YORK, 477. — 1859.

ACTION against indorsers of bills addressed to the payee at New York, and accepted by the payee "payable at Continental Bank, New York." Presentment at the Continental Bank; payment refused; due notice. Judgment for plaintiff.

S. B. STRONG, J., [after disposing of other questions]. The two drafts were respectively addressed to the drawee in New York, and were accepted by him, payable at the Continental Bank in that city, where the demand of payment was made. The defendants' counsel contended on the trial that the drafts were not duly accepted or demand of payment properly made, and they cited the case of *Woodworth v. The Bank of America* (19 John. 391), to show that such practices were irregular and did not attach any responsibility to them. In that case, however, the note was in fact payable in Albany, and there was a marginal memorandum, signed by the maker, that it was payable in New York. That memorandum was made after the note had been indorsed by Judge Woodworth, and without his knowledge. It was held, and perhaps properly, that the memorandum was an alteration of the note, and discharged the indorser. The alteration consisted in making it payable in a different city, and that rendered it material. It is not of course an alteration of a draft to accept it as payable at a designated place in the same city, and if it could be deemed a change at all, it is not made by the payee or indorsee, nor is it at all material.

So, too, in the case of *Walker v. Bank of the State of New York* (13 Barb. 636), the draft was directed to the drawee in New York and accepted by him, payable at Clayville Mills, in Oneida county. It was properly held that the change was material and rendered the acceptance void, and that as no notice of such acceptance was given to the indorsees, they were discharged.

If, in the case under consideration, the drafts had been made payable at a particular store, counting house, or office in New York, it would have been a change, although I do not think that it would

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<sup>9</sup> Opinion for reversal was also delivered by Lord Morris. — H.

even then have been a material one, to have accepted it as payable at another place in the same city. No possible injury can result to the drawer or indorser by making a bill of exchange, directed to the drawee in a city generally, payable at some particular place in the same city. It becomes *pro hac vice* the place of business of such drawee. The cases differ as to whether the holder may not, nevertheless, present the bill for payment at the ordinary place of business, or if he has none, the residence of the drawee;<sup>1</sup> but I have seen none which decides that he is bound to do so. I am confident that the practice pursued in this instance corresponds with commercial usage, and think that it should be sustained.

[The court then holds the notices sufficient.]

Judgment affirmed.<sup>2</sup>

## 2. QUALIFIED ACCEPTANCE.

### (a) Conditional acceptance.

#### § 229 STEVENS v. ANDROSCOGGIN WATER POWER CO.

62 MAINE, 498. — 1874.

APPLETON, C. J. — This is an action of assumpsit against the defendants, as acceptors of the following order, drawn on them by James Hibbard :

SHELBURNE, Feb. 25, 1873.

ANDROSCOGGIN WATER POWER CO.,

EDWARD PLUMMER, Agent.

Please pay to James A. Stevens, for cutting and hauling lumber, the sum of one hundred and thirty-four dollars, and charge the same to my account.

JAMES HIBBARD.

<sup>1</sup> If a particular place is specified in the acceptance, the presentment for payment must be made at that place or the drawer and indorsers are discharged. *Brown v. Jones*, 113 Ind. 46. Contra: *Niagara District Bank v. Fairman, etc., Co.*, 31 Barb. (N. Y.) 407, where it is held that if the bill is addressed to the drawee in Town A., and he accepts it payable in Town B., it is improper to make presentment in B., but it should be presented to the acceptor in A. Otherwise if he accepts it payable at a particular place in Town A. — H.

<sup>2</sup> "Before the 1 & 2 Geo. 4, c. 78 (Sergeant Onslow's Act), it was a point much disputed whether, if a bill payable generally was accepted payable at a particular place, such an acceptance was a qualified one. That statute, however, has now settled that an acceptance payable at a banker's or other particular place is, as against the acceptor, a general acceptance unless the acceptor express in his acceptance that the bill is payable there only, and not otherwise or elsewhere." Byles on Bills, p. 197. *Rowe v. Young*. (2 Brod. & Bing. 165), held such an acceptance to be qualified. In the United States such acceptances have generally been held to be unqualified. *Wallace v. McConnell*, 13 Peters (U. S.) 136; 1 Daniel, §§ 520, 641-643. The Neg. Inst. L., § 228, enacts substantially the provisions of Sergeant Onslow's Act, now found in Bills of Exchange Act, § 19. — H.



In answer to a letter from the plaintiff, the defendants on March 18, 1873, wrote the following letter to him:

LISBON FALLS, ME., *March* 18, 1873.

MR. JAMES A. STEVENS:

Dear Sir: Yours of the thirteenth inst., is received. We shall not pay any orders of Mr. Hibbard until we settle with him. If there is anything over, I will keep it back for the purpose.

Yours truly,

E. PLUMMER, *Agent*.

The order of February 25 was retained by the defendants in their possession. On March 25, 1873, the defendants were summoned as trustees of James Hibbard, in a suit in which one Bean was plaintiff, returnable at the September term of the Supreme Judicial Court for the county of Androscoggin, and for the sum of \$356.70. On April 28, 1873, the plaintiff's attorneys were notified that this action would be entered at the September term, and that the trustee would make a full statement as to all orders drawn, and leave the question of liability to the decision of the court. Prior, however, to the September term, Hibbard settled the suit of Bean, and directed the defendants to pay the amount due, without notifying the plaintiff in this suit. At the time of this settlement there were due Hibbard from the defendants, four hundred and four dollars and forty-seven cents, out of which sum they paid Bean three hundred and sixty-nine dollars and fifteen cents, and the balance of thirty-five dollars and thirty-two cents they paid Hibbard. This payment was on August 2, 1873.

An acceptance may be absolute or conditional. A conditional acceptance at once becomes absolute upon the performance or happening of the condition.

In the present case the defendants' promise is to pay if in settlement "there is anything over." When the acceptance is conditional, the holder may accept or refuse the offer.<sup>3</sup> The plaintiff acceded to the proposition of the defendants — permitted the order to remain with them, and did not sue out a trustee writ, by which his whole debt would have been secured. There was a settlement and the amount due exceeded the amount of Hibbard's order. The defendants then became liable, and this liability, conditional in the first instance, accrued long before the trustee suit of Bean. The payment to Bean by the defendants was in their own wrong, and cannot defeat the prior right of the plaintiff.

Defendants defaulted.<sup>4</sup>

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<sup>3</sup> See Neg. Inst. L., § 230. — H.

<sup>4</sup> Any condition clearly varying the tenor of the bill renders the acceptance conditional. 1 Daniel on Neg. Inst., § 509-515; 4 Am. & Eng. Encyc. L. (2nd ed.), pp. 227-232. The conditional acceptance becomes absolute upon the happening of the condition. *Ibid.* An acceptance "when in funds" is conditional. The bill is payable when the acceptor has in his hands funds which

(b) *Partial acceptance.*

§ 229

PETIT v. BENSON.

COMBERBACH, 452. — 1697.

A BILL was drawn upon the defendant, who accepts it by indorsement in this manner: "I do accept this bill to be paid, half in money and half in bills." And the question was, whether there could be a qualification of an acceptance; for it was alleged that his writing upon the bill was sufficient to charge him with the whole sum. But 'twas proved by divers merchants, that the custom among them was quite otherwise, and that there might be a qualification of an acceptance; for he that may refuse the bill totally, may accept it in part. But he to whom the bill is due may refuse such acceptance, and protest it so to charge the first drawer; and tho' there be an acceptance, yet after that he hath the same liberty of charging the first drawer as he before had.<sup>5</sup>

(c) *Local acceptance.*

§ 229

TROY CITY BANK v. LAUMAN.

[Reported herein at p. 672.]

HALSTEAD v. SKELTON, 5 Q. B. 86 (1843). TINDAL, C. J. — The statute<sup>6</sup> enacts that, where a bill is accepted payable at a banker's, without further expression in the acceptance, such acceptance shall be deemed and taken to be to all intents and purposes a general acceptance of such bill; but the meaning of this enactment is not that in such a case, presentment at the banker's shall be an invalid presentment, but that, in an action against an acceptor, presentment to him shall be good, and consequently that it shall be unnecessary to present or to aver presentment at the banker's. A bill of exchange drawn generally on a party may be accepted in three different forms: Either generally, or payable at a particular banker's, or payable at a par-

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the drawer has a present right to demand and receive. *Wintermute v. Post*, 24 N. J. L. 420; *Wallace v. Douglas*, 116 N. Car. 659. An acceptance of a sixty-day bill "payable on giving up bill of lading, etc.," is a qualified acceptance; but the acceptor is bound even though the bill of lading is not tendered until after the maturity of the bill. *Smith v. Vertue*, 30 L. J. C. P. 56. — H.

<sup>5</sup> "In Molloy and the other books there is a whole paragraph about the partial acceptance of a bill of exchange, and they allow it to be good." *Wegersloffe v. Keene*, 1 Strange, 214, 225. — H.

<sup>6</sup> Namely, Sergeant Onslow's Act, 1 and 2 Geo. 4, c. 78. See note on page 478, *ante*. — C.

ticular banker's and not elsewhere. If the drawee accepts generally, he undertakes to pay the bill at maturity when presented to him for payment. If he accepts payable at a banker's, he undertakes (since the statute) to pay the bill at maturity when presented for payment either to himself or at the banker's. If he accepts payable at a banker's and not elsewhere, he contracts to pay the bill at maturity provided it is presented at the banker's, but not otherwise.

Here the bill was accepted according to the second of these three forms; *i. e.*, payable at a banker's, without any restrictive words; so that presentment at the banker's (though if made it would have been a good presentment) was yet not, as against the acceptor, necessary.

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(d) *Acceptance qualified as to time.*

§ 229

HATCHER *v.* STALWORTH.

25 MISSISSIPPI, 376. — 1853.

ACTION by payee against acceptor on a bill payable at sight. Plaintiff presented the bill to defendant, who wrote to plaintiff that he (defendant) would pay the order, but could not say when. Judgment for plaintiff.

MR. JUSTICE YERGER delivered the opinion of the court.

We see no error in this record. Where a party, on whom a bill is drawn at sight, offers or promises to pay at a future day, that amounts to an acceptance, if acceded to by the holder. (7 Pick. R. 34; Story on Bills, §§ 243, 244.)

The proof in this case shows this to have been the state of facts; and we, therefore, must affirm the judgment.<sup>7</sup>

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(e) *Acceptance by one or more drawees, but not by all.*

§ 229

TOMBECKBEE BANK *v.* DUMELL & LYMAN.

[Reported herein at p. 687.]

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<sup>7</sup> If the bill is drawn payable on a given date it may be accepted payable at a different date. *Russell v. Phillips*, 14 Q. B. 891; *Green v. Raymond*, 9 Neb. 295; *Vanstrum v. Liljengren*, 37 Minn. 191.

If a bill is drawn payable two months after sight, and is presented on Sept. 14, and accepted "payable Nov. 14," this is not a qualification whether there be days of grace or not. So, if there be days of grace, and it is accepted "payable Nov. 17," this is also treated as an acceptance according to the tenor of the bill. But an acceptance payable on any other day than the nominal or peremptory day of payment is a qualified acceptance. *Kenner v. Creditors*, 7 Martin N. S. (La.) 540. — H.

## 3. EFFECT OF QUALIFIED ACCEPTANCE.

(a) *Holder may refuse qualified acceptance.*

§ 230

BOEHM v. GARCIAS.

1 CAMPBELL, 425, note. — 1808.

ACTION on a bill drawn on Lisbon, "payable in *effective*, and not in *vals reais*." The defendant was the drawer of the bill; and the question was, whether it had been dishonored for non-acceptance? The drawees offered to accept it, payable in *vals denaros*, another sort of currency, which was refused. The defendant now proposed to show, that *vals denaros* was sufficient to answer what was meant by "*effective*."

LORD ELLENBOROUGH. — The plaintiff had a right to refuse this acceptance. The drawee of a bill has no right to vary the acceptance from the terms of the bill, unless they be unambiguously and unequivocally the same. Therefore, without considering whether a payment in *denaros* might not have satisfied the term "*effective*," an acceptance to pay in *denaros* was not a sufficient acceptance of a bill drawn payable in "*effective*." The drawees ought to have accepted generally, and an action being brought against them on the general acceptance, the question would properly have arisen as to the meaning of the term.

§ 230 WINTERMUTE v. POST, 24 N. J. L. 420, 423 (1854). HAINES, J. — The remaining and principal point arises from the tenor of the acceptance, "when in funds." This is a conditional acceptance, and the plaintiff was not bound to take it. If he were not satisfied with it, he might have protested the note for non-acceptance, and looked to the drawer for its payment. But having taken it without objection, he must submit to its terms, and before he can enforce it against the acceptor he must show funds of the drawer in his hands.<sup>8</sup>

(b) *Qualified acceptance discharges non-assenting antecedent parties.*§ 230 WALKER v. BANK, 13 Barbour (N. Y.) 636 (1852).<sup>9</sup>

Action against the bank, as agent, for negligence in not giving

<sup>8</sup> Accord: *Stevens v. Androscoggin Water Power Co.*, 62 Me. 498, ante. p. 673; *Petit v. Benson*, Comb. 452, ante, p. 675; *Hatcher v. Stalworth*, 25 Miss. 376, ante, p. 676; *Green v. Raymond*, 9 Neb. 295; *Gibson v. Smith*, 75 Ga. 33. If an agent, as a bank, receives a qualified acceptance without authority, the agent becomes liable to the principal for any loss ensuing therefrom. *Walker v. Bank*, 9 N. Y. 582. — H.

<sup>9</sup> Affirmed 9 N. Y. 582. — H.

notice of dishonor of certain bills. The bills were drawn upon E. C. Hamilton and were accepted in this form: "Accepted, payable at the Am. Ex. Bank: Empire Mills by E. C. Hamilton, Treas."

HUBBARD, J. — The only question presented is whether Hamilton, the drawee, can be charged as acceptor. If he cannot, the defendants' liability is undisputed, because of their neglect to give notice of dishonor. It is an undoubted rule that an acceptance dispensing with notice, must be absolute according to the tenor of the bill; not qualified, or varying in any material particular. (Story on Bills, § 240, and cases cited in note 2; Chitty on Bills, 329.) The obvious reason is, that antecedent parties, if made liable, are entitled to full recourse against the acceptor, which they cannot have if the acceptance is conditional. It is also well settled that no one but the drawee named can become an acceptor, except for honor *supra protest*. (Story on Bills, § 121, *et seq.*) [The court then holds that no one was bound by this acceptance.] It follows, therefore, that the defendant should have treated the bills as dishonored, and given notice of non-acceptance to the indorsers, who by the omission are discharged from liability.<sup>10</sup>

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<sup>10</sup> See also judges' answers to the 3d question in *Rowe v. Young*, 2 Brod. & Bing. 165; 1 Daniel, §§ 510-511. — H.

## ARTICLE XII.

### PRESENTMENT OF BILLS OF EXCHANGE FOR ACCEPTANCE.

#### 1. In what cases presentment for acceptance necessary.

§ 240

HART *v.* SMITH.

15 ALABAMA, 807. — 1849.

DARGAN, J. — This was an action of assumpsit, on a bill of exchange, drawn by the defendant in favor of the plaintiff, on Desha & Smith, dated the 26th February, 1846, payable at sight. The only evidence introduced to charge the drawer was the bill, and protest, showing a demand of payment made of the drawees, on the 4th of March, 1846, and notice to the drawer. The court charged the jury, that the plaintiff could not recover.

A bill, payable on demand, or at any fixed time, need not be presented for acceptance, but a demand of payment, at the time the holder has the legal right to demand payment, is all that is necessary. And if the bill be not paid, the holder may protest it for non-payment, and on his giving due notice to the drawer and indorsers, their liability is fixed. (*Evans v. Bridges*, 4 Porter, 345; 1 Peters, 25, 2 Ib. 170; Chitty on Bills [10th ed.], 272.) But when the time of payment is uncertain, and a presentation of the bill is necessary, in order to ascertain and fix the time of payment, as if the bill be payable at a number of days after sight, then the bill must be presented for acceptance before payment is demanded. (Story on Bills, § 112, 227; Chitty on Bills [10th ed.], 272; Bayley on Bills [5th ed.], 217, 218.)<sup>1</sup>

It is contended that a bill payable at sight is entitled to days of grace, and therefore it must be presented for acceptance before payment can be demanded.

I am free to confess, that my opinion, untrammelled by authority, would incline me to hold that a bill of exchange, *payable at sight*, is not entitled to days of grace, and that payment may be demanded on presenting the bill; which, if refused, would authorize the holder forthwith to have it protested for non-payment, and, on giving notice to the drawer, to hold him liable. But the law seems to be settled otherwise. Judge Story, in his treatise on bills, says, "that days of grace are allowed on all bills, whether payable at a certain time after date, after sight, or even at sight. And although there

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<sup>1</sup> Neg. Inst. L. § 240. — H.

has been some diversity of opinion, whether bills payable at sight are entitled to days of grace, it is now settled by the decisions, both in England and America, that days of grace are allowable on such bills." (§ 342, p. 429.) To the same effect, see Chitty on Bills [10th ed.], 376; Bayley on Bills [5th ed.], 244, 245; Selwyn's N. P. [9th ed.], 351; *Coleman v. Sayre*, 1 Barnard, 303; *Dehers v. Harriot*, 1 Show. 165; Stephen's N. P., 876.)<sup>2</sup> Under the influence of these authorities, I feel constrained to hold that a bill payable at sight is entitled to days of grace; consequently a demand of payment made of the drawer, upon the first presentation of the bill to him, is insufficient to charge the drawer, for the bill is not then due. As there was no evidence of any previous presentation of the bill for acceptance, nor notice given of non-acceptance, the demand of payment was prematurely made and was, therefore, a nullity.<sup>3</sup>

As the evidence fails to show a demand of payment on the day the bill was payable, the court correctly instructed the jury that the plaintiff could not recover.

Let the judgment be affirmed.

## § 240

## PLATO v. REYNOLDS.

27 NEW YORK, 586. — 1863.

ACTION against drawers of a bill. Judgment for plaintiff.

WRIGHT, J. — The bill which was drawn, payable one day after date, was presented to the drawee for acceptance on the day it matured; acceptance was refused, and it was protested for non-acceptance. The certificate of the notary states that on the same day (12th September) he forwarded written notice, by mail, to the drawers (the defendants) and indorsers (Miles and Bartlett), informing them of the non-acceptance thereof. It was also proved that on the following day the payees (Miles and Bartlett) received the original draft, with notices of protest for themselves and the defendants, and caused such notice to be served on the latter that day. The drawee also informed one of the defendants, on the 12th September, at the office of the payees, that he had not accepted or paid the draft. In view of this proof, I think the referee did not err in refusing to dismiss the complaint, and in deciding that the bill was duly pre-

<sup>2</sup> Accord: *Knott v. Venable*, 42 Ala. 186; *Cribbs v. Adams*, 13 Gray (Mass.) 597; *Walsh v. Dart*, 12 Wis. 635; *Lucas v. Ladew*, 28 Mo. 342.

Contra: *Trask v. Martin*, 1 E. D. Smith (N. Y. C. P.) 505, where a very full and learned discussion of the subject will be found. — H.

<sup>3</sup> Under the Neg. Inst. Law, days of grace are abolished, § 145, and such a bill would not, under the Law, have to be presented for acceptance. — H.

sent and protested, and that due notice was given to the defendant to charge them as drawers.

The defendants claim that the draft being due when presented, and demand made by the notary, it was then too late to present it for acceptance; and presentment for acceptance of a bill which is due, is not sufficient to charge the drawers. But it is well settled that the holder of a bill, payable a specified length of time after date, or on a day certain, need not, for the purpose of charging the drawers and indorsers, present it for acceptance until it becomes due and payable. It may be presented before or at the time of its maturity. (Edwards on Bills, 387; Story on Bills, § 231; *Allen v. Suydam*, 20 Wend. 321; s. c., 17 Id. 368.) \* \* \*

All the judges, except Marvin, J., agreed that a refusal to accept on the day payment is due is equivalent to a refusal to pay, and renders a demand of payment unnecessary.\* On the question of evidence, all the judges concurred.

Judgment reversed,<sup>5</sup> and new trial ordered.

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§ 241

ROBINSON v. AMES.

20 JOHNSON (N. Y.) 146. — 1822.

THIS was an action of assumpsit, on a bill of exchange drawn by the defendants, merchants in Augusta, in the state of Georgia, on the 6th of March, 1819, upon Townsend and White, merchants, in the city of New York, for five hundred dollars, payable sixty days after sight, to Starr and Ross, or order, by whom it was indorsed to the plaintiff. The cause was tried at the New York sittings, in June, 1821, before the chief justice. The bill was presented for acceptance on the 20th of May, 1819, and notice of non-acceptance sent, by mail, on the next day, to the drawers, by a notary, directed to them at Augusta, in Georgia. On the 22d of July, 1819, the same notary presented the bill to the drawers for payment, which they refused, alleging the want of funds. Notice of non-payment was sent through the post-office, two or three days afterwards, addressed to the defendants, at Savannah, in Georgia.

Townsend, one of the drawees, who was a witness for the plaintiff, testified, that on the 20th day of May, 1819, the drawees had no funds in their hands belonging to the defendants, and had then accepted drafts to the amount of three or four thousand dollars more than they had funds of the defendants, and that this was the last bill drawn

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<sup>4</sup> Accord: *Philpott v. Bryant*, 3 Car. & P. 244; *Washington Bank v. Triplett*, 1 Pet. (U. S.) 25. — H.

<sup>5</sup> On a question of admission of evidence. — H.



by them. That the want of funds proceeded from a fall in the price of cotton shipped by the defendants to T. and W.; that by an agreement between them, the defendants were authorized to make purchases of cotton, on the joint account of themselves and T. and W., and to draw on T. and W. for the amount. That, on the 26th of April, 1819, T. and W. stopped payment. That after the 6th of March, and before the failure of T. and W., they had received a considerable amount of cotton from the defendants, but had accepted the bills of the defendants to a larger amount than the value of the cotton so shipped, and the difference was owing to a loss on the cotton shipped; that, if the defendants were to pay all the bills, T. and W. would owe them five or six thousand dollars; but if T. and W. were to take up all the bills, the drawees would owe them three or four thousand dollars.

It was proved, that the mail which left Augusta about the 10th of March, was lost; and that the mail goes from that place to New York, in ten days, and leaves the former place three times a week. That where bills are remitted by merchants, it is the usual course to send the bill by one mail, and to advise by the next.

A verdict was taken for the plaintiff, for five hundred and seventy-two dollars, subject to the opinion of the court on a case, as above stated.

SPENCER, CH. J., delivered the opinion of the court.

The questions in this case are: (1) Whether the bill was transmitted in due time; and (2) Whether the want of fund in the hands of the drawees, will excuse the delay in presenting the bill, or the irregularity in the notice of the non-payment of it.

1. I am entirely satisfied that there is no foundation for saying the defendants are precluded from setting up laches, because they had no right to draw the bill. The case of *Bickerdike v. Bollmar* (1 Term Rep. 405), is considered the first case deciding that notice to the drawer of the dishonor of the bill was unnecessary; and in that case the drawer had no funds, and knew he had none, in the hands of the drawee. The drawing the bill was considered a fraud, and it was held that he was not entitled to notice, and could not be injured by the want of it. It has, however, since that case, repeatedly been decided, that where there are any funds in the hands of the drawee, so that the drawer has a right to expect the bill will be paid, or where there are not any funds, yet if the bill was drawn under such circumstances as induced the drawer to entertain a reasonable expectation that the bill would be accepted and paid, the person so drawing it is entitled to notice; and, *a fortiori*, he is entitled to have the bill duly presented. The rule is correctly laid down in *Claridge v. Dalton* (4 Maule & Selw. 229), by Lord Ellenborough. The principle which has been stated is very ably supported by Chief Justice Marshall, in *French v. The Bank of Columbia* (4 Cranch's

Rep. 153), where the principal authorities are reviewed. There is nothing more important, than that, in questions of a general mercantile nature, there should be a uniformity of decision; and, although the justice and equity of this rule may not, in some cases, be perceived, where the payee has purchased a bill, and it is drawn in good faith, and no conceivable loss has happened by the want of notice; yet, as there may be cases where, though there were no funds in the hands of the drawee, the drawer may be injured by the want of notice, it is better that the rule on the subject should be general and uniform throughout the mercantile world.<sup>6</sup>

In the case of *Miller v. Hackley* (5 Johns. Rep. 375); *Weldon and Furniss v. Buck and another* (4 Johns. Rep. 144); and *Mason and Smede v. Franklin* (3 Johns. Rep. 202), it was decided that if a bill was presented for acceptance, and the drawee refused to accept it, and notice thereof was duly given, a demand of payment, and notice of a refusal to pay, was unnecessary, because the drawer was fixed already.<sup>7</sup>

2. The only remaining question, then, is, whether there was laches in presenting the bill for acceptance; for there is no doubt that regular notice was given of the refusal to accept the bill, the day subsequent to the demand. I do not find, that where a bill of exchange has been drawn payable at sight, or any specified number of days after sight, that there is any definite or fixed rule when the bill shall be presented for acceptance, other than this, that due diligence must be used. And it is certain, that with respect to such bills, and particularly where they are negotiated by the payee, there is much more latitude, as to the time of presentment, than where the bill has a fixed period of payment. In the case of *Muilman v. D'Eguino* (2 H. Bl. Rep. 565), which is a very leading case on this subject, the judges felt the difficulty of saying at what time such a bill should be presented for payment. Ch. J. Eyre observed, that the courts had been very cautious in fixing any time for an inland bill, payable at a certain period after sight, to be presented for acceptance. He said, that if, instead of drawing their foreign bills payable as *usances*, in the old way, merchants chose, for their own convenience, to draw them in this manner and to make the time commence when the holder pleases, he did not see how the courts could lay down any precise rule on the subject. But he thought the holder was bound to present the bill in a reasonable time, in order that the period might commence from which the payment was to take place; and that what was reasonable time must depend on the particular circumstances of the case. Buller, J., said, that he thought a rule might, thus far, be laid down as to laches, with regard to bills pay-

<sup>6</sup> See Neg. Inst. Law, § 185 and § 245. — H.

<sup>7</sup> See § 248. — H.

able at sight, or a certain time after sight, namely, that they ought to be put in circulation. If they are circulated, he said, the parties are known to the world, and their credit is looked to; and if a bill, drawn at three days sight, was kept out in that way for a year, he could not say there would be laches; but further than that, no rule could be laid down. Heath, J., observed that no rule could be laid down as to the time for presenting bills, payable at sight, or a given time after; that in the French ordinance of 1673 (Postlethwaite's Dict. tit. Bills of Exchange), it is said, that a bill, payable at sight, or at will, is the same thing, and that this agreed with Marius.

Now, here, the bill was put in circulation by Ross and Starr; and although it is probable, that the first of exchange was lost, by the loss of mail, we are not authorized to consider that as a fact in the case; but I cannot say, that upon such a bill there has been laches. We perceive how extremely cautious the judges were, in the case cited, in laying down any rule. The evident inclination of their minds was, that when the payee put the bill in circulation, the subsequent holder was not bound to any strict presentment. The drawers of the bill evidently did not mean to limit the time of presentment, by making the bill payable at sixty days after sight. They meant to give a latitude, as to time, to the holder; and my conclusion is, that there is not such laches as will discharge the drawers.

Judgment for the plaintiff.<sup>8</sup>

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<sup>8</sup> Accord: *Wallace v. Agry*, 4 Mason (U. S. C. C.) 336; s. c., 5 Mason, 118, in which a "sixty days after sight" bill drawn June 18 at Havana, Cuba, on W. in London, and there presented Oct. 31, having been locked up in the holder's hands in Boston, from July 6 to Sept. 29, was, on the second trial, found by the jury to have been presented within a reasonable time; *Aymar v. Beers*, 7 Cowen, (N. Y.) 705, in which case a "three days after sight" bill drawn Dec. 12 in New York, presented Jan. 10 in Richmond, Va., having been in the payee's hands during that time, was held by the court to have been presented within a reasonable time, under the circumstances of the case; *Bolton v. Harrod*, 9 Mart. (La.) 326; *Gowan v. Jackson*, 20 Johns. (N. Y.) 176; *Montelius v. Charles*, 76 Ill. 305.

In the following cases the delay was deemed to be unreasonable: *Mullick v. Radakissen*, 9 Moore P. C. 66; *Fernandez v. Lewis*, 1 McCord, (S. C.) 322; *Dumont v. Pope*, 7 Blackf. (Ind.) 367; *Phoenix Ins. Co. v. Allen*, 11 Mich. 501; *Chambers v. Hill*, 26 Tex. 472.

Whether what is a reasonable time is a question for the jury or for the court has occasioned some conflict. The question was left to the jury in *Wallace v. Agry*, *supra*; it was decided by the court in *Aymar v. Beers*, *supra*; it was held to be "a mixed question of law and fact" in *Prescott Bank v. Caverly*, 7 Gray, (Mass.) 217. See 1 Daniel, § 466; note, 17 Am. Dec. 544-549. — H.

## II. What constitutes sufficient presentment.

§ 242

SHARPE *v.* DREW.

9 INDIANA, 281. — 1857.

STUART, J. — Suit on a bill of exchange by Drew, indorsee, against Sharpe, the indorser. The action was instituted before the mayor of the city of Evansville, where the plaintiff had judgment for the bill and interest. Sharpe appealed to the Circuit Court, where it was tried with the like result. Sharpe excepted to the rulings of that court, and now appeals to this.

Two points are made and argued — 1. The evidence of presentment to the drawee for acceptance. 2. The evidence of notice of protest to Sharpe.

1. It is correctly contended that the presentment for acceptance should be to the drawee himself, if he can be found. (Chitty on Bills, 278.) If to an agent or other person authorized to accept, the fact should appear.

In the present case the only evidence of presentment is the certificate of protest. The notary certifies "that on, etc., I did present the annexed draft of T. C. Wetmore on W. W. Peters, at the store of Silliman and Gardiner, and demanded acceptance of the same, which was refused," etc. It is contended that this is not evidence of a presentment to Peters for acceptance.

The statute makes notarial certificates evidence of the facts therein stated (2 R. S., p. 91.) The notarial certificate is clear as to the facts of presentment, the place of presentment, the demand of acceptance, and the refusal. To whom was it presented? Who refused to accept? It cannot admit of doubt that Peters himself was the person. The plain English of the protest is that the notary found Peters at the store of Silliman and Gardiner, Troy, N. Y., and there demanded of him acceptance, which Peters refused. The form here used seems to be the common one prescribed by the books. (Chitty on Bills, 333; Byles on Bills, 191.)

The language is not even obscure. The presentment, the demand, the refusal, all clearly mean, that it was the drawee who was the object and actor. We are not at liberty to doubt the sufficiency of the evidence that the bill was duly presented for acceptance.

[The Court then holds the notice of dishonor sufficient.]

PER CURIAM. — The judgment is affirmed, with 5 per cent. damages and costs.<sup>9</sup>

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<sup>9</sup> It would seem that presentment for acceptance must be made to the drawee or his authorized agent in person and that diligent inquiry should be made for the drawee if no person is found at his office or residence having authority to accept for him. *Bank v. Triplett*, 1 Pet. (U. S.) 25, 34; *Wisc-*

## § 242 FALL RIVER UNION BANK v. WILLARD.

5 METCALF (MASS.) 216. — 1842.

ACTION against indorser of bill. The jury were instructed that if the drawees were informed by the bank that it held such a bill drawn on them by A. (and indorsed by defendant), and they thereupon informed plaintiff that they should not accept nor pay it, and if no notice thereof was given to the indorser (defendant), he was discharged. Verdict for defendant.

HUBBARD, J. — It is a well established principle of the law regulating bills of exchange, that the holder of a bill, payable at a certain time after date, need not present it for acceptance prior to the day of payment. And though it is usual and safe so to do, as he thereby strengthens his security, or, in case of non-acceptance, acquires an immediate right to call on the other parties to the bill, yet he is under no legal obligation to do it, nor can the omission be taken advantage of by the drawer or indorsers. (*Goodall v. Dolley*, 1 T. R. 7112; *Chit. on Bills*, Part I., c. 5; 3 Kent, Com. [4th ed.] 82; *O'Keefe v. Dunn*, 6 Taunt. 305; s. c., 1 Marsh. 613.)

[The court then decides that an agreement by the holder made with the drawer not to present the bill for acceptance, but only for payment at maturity, will not discharge the accommodation indorser, although such agreement was not known or assented to by the indorser.]

The evidence which was introduced tended to show that the cashier of the Fall River Union Bank (the plaintiffs in this suit) met Chace, one of the house upon which the bill was drawn, and informed him that the bank had the draft (now in suit), upon which Chace told the cashier that they should not accept or pay it. And the instruc-

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*man v. Chiappella*, 23 How. (U. S.) 368, 377; *Cheek v. Roper*, 5 Esp. 175. It has, however, been held that it will be presumed that a clerk in the drawee's counting house has authority to accept or refuse to accept. *Nelson v. Potterall*, 7 Leigh, (Va.) 180; *Stainback v. State Bank*, 11 Gratt. (Va.) 260. "Comparing presentment for acceptance with presentment for payment, it is clear that the two cases are governed by somewhat different considerations. Speaking generally, presentment for acceptance should be personal, while presentment for payment should be local. A bill should be presented for payment where the money is. Any one can then hand over the money. A bill should be presented for acceptance to the drawee himself, for he has to write the acceptance; but the place where it is presented to him is comparatively immaterial, for all he has to do is to take the bill. Again (except in the case of demand drafts), the day for payment is a fixed day; but the drawee cannot tell on what day it may suit the holder to present a bill for acceptance. These considerations are material as bearing on the question whether the holder has used reasonable diligence to effect presentment." Chalmers, Bills of Exchange Act (5th ed.), pp. 137-138. — H.

tion to the jury was, that if no notice thereof was given to the indorser, he was discharged. Waiving the question whether the cashier was agent for the plaintiffs for the purpose of presenting the draft for acceptance, or not, we are of opinion that this was not a due presentment of the bill for acceptance. The term presentment imports, not a mere notice of the existence of a draft which the party has in his possession, but the exhibiting of it to the person on whom it is drawn; that he may see the same, and examine his accounts or correspondence, and judge what he shall do; whether he shall accept the draft, or not. Here there appears to have been nothing more than a casual meeting of the parties, and the conversation on the subject of the draft ensued. If this had been communicated, it would have created no obligation on the part of the indorser to make present payment, and consequently such conversation imposed no present duty on the holders, as to the other parties to the bill. With this view of the case we are not satisfied with the instruction given to the jury. To confirm it, would tend to introduce a looseness of practice on the subject of presenting bills for acceptance, which will lead to disputes and difficulties greater than now exist.

Verdict set aside, and a new trial granted.<sup>1</sup>

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§ 242 TOMBECKBEE BANK *v.* DUMELL & LYMAN.

5 MASON (U. S. C. C.) 56. — 1828.<sup>2</sup>

ASSUMPSIT on a bill of exchange drawn on 17th of March, 1827, in Alabama, by Stone, Ellis & Co., at sixty days' sight, on the defendants, for \$3,000, payable to Moses Sewall or order, and by him indorsed to the plaintiffs. The declaration averred a presentment for acceptance, and an acceptance and a subsequent non-payment. There were other counts on other similar bills. Plea, the general issue.

At the trial, the sole defense relied on was, that the acceptance was made by Jacob Dumell after the dissolution of the partnership between him and his co-defendant, John Lyman. It appeared in evidence, that the firm was dissolved on the 1st of January, 1827; but it was not advertised in the newspapers until the 5th of April, 1827, when it was published at Providence, where the firm carried on business. The acceptances of all the bills were after the dissolution was so advertised.

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<sup>1</sup> But it seems that the actual exhibition of the bill is not necessary if the drawee is enabled, without seeing it, to give an intelligent response. 1 Daniel, § 462; *Fisher v. Beckwith*, 19 Vt. 31; *Burlington First N. B. v. Hatch*, 78 Mo., 13. Otherwise an extrinsic acceptance, as by telegram, would serve no needful purpose. See Neg. Inst. L. § 222. — H.

<sup>2</sup> s. c., 24 Fed. Cas. 18. — H.

STORY, J. — Upon this statement of facts, which is not controverted, I am of opinion, that the plaintiffs are not entitled to recover. No partner has any authority after a dissolution of the partnership to bind his copartners by any new contract. The acceptance of these bills is altogether a new contract. It is true, that if the partnership is still ostensibly carried on in the name of the firm, and no public notice is given of the dissolution of the partnership, though it is secretly dissolved, third persons, dealing with the firm upon the faith of the partnership and joint responsibility, are entitled to hold all the partners. But it is otherwise, where the dissolution is made public. Here, before the acceptance, the dissolution was publicly announced. The partners had not held out to the payee, or the present holders, that they would accept the bill. Every non-accepted bill is necessarily taken upon the faith and credit of the drawer; and no person can bind the drawee by his acceptance, except a person having an express or implied authority for that purpose. After the dissolution of the partnership, and a public notice of it, there was a withdrawal of all such authority; and consequently the acceptance, as to John Lyman, is void. Upon principle then, the action, being joint upon a joint acceptance, fails as to both.

*Mem.* By consent of the parties, the plaintiff discontinued as to Lyman, amended his declaration, and took a judgment against Dumell alone.<sup>3</sup>

### III. When presentment for acceptance excused.

#### § 245 CHITTY ON BILLS OF EXCHANGE, p. 307.

IF the drawee of a bill cannot be found at the place where the bill states him to reside, and it appear that he never lived there, or has absconded, the bill is to be considered as dishonored (*Anon. Ld. Raym.* 743); but if he has only removed, it is incumbent on the holder to endeavor to find out to what place he has removed, and to make the presentment there (*Collins v. Butler*, 2 Stra. 1087); and he should in all cases make every possible inquiry after the drawee, and if it be in his power present the bill to him; though it will be unnecessary to attempt to make such a presentment if the drawee has left the kingdom, in which case it will be sufficient to present the bill at his house (*Cromwell v. Hynson*, 2 Esp. 211), unless he have a

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<sup>3</sup> Such an acceptance is a qualified acceptance (*Neg. Inst. L.*, § 229 subsec. 5), and binds the one accepting (*Smith v. Milton*, 133 Mass. 369), but if received by the holder discharges prior non-assenting parties, *ante*, p. 677. If one of the drawees refuses to accept it would seem unnecessary to make a further presentment upon the others; but the language of § 242, subsec. 1, provides for presentment to all. — H.

known agent, when it should be presented to him. (Ibid; *Phillips v. Astling*, 2 Taunt. 206.) If on presentment it appears that the drawee is dead, the holder should inquire after his personal representative, and, if he live within a reasonable distance, should present the bill to him.<sup>4</sup> (Molloy, b. 2, c. 10, § 34; Poth. pl. 146.)<sup>5</sup>

#### IV. Duty of holder where bill not accepted.

§ 247

UNITED STATES *v.* BARKER.

24 FEDERAL CASES (CIR. CT., DIST. PA.) 1004. — 1824.<sup>6</sup>

ACTIONS on bills of exchange.

WASHINGTON, J. [charged the jury as follows]: \* \* \* The law merchant, as settled by judicial decisions in England, and in New York, requires that, in all cases of bills which must be presented for acceptance, due notice of the protest, in case acceptance is refused, must be given, without waiting for the maturity of the bill, and a demand of payment; such too is the rule in Massachusetts and South Carolina. And the rule is the same in England, even in cases of bills which need not be presented for acceptance, if in fact they be presented, and acceptance be refused. It is supposed that the cases of *Brown v. Barry*, 3 Dall. 365, and *Clark v. Russel*, id. 415, have established a different rule as to the law merchant of the United States. We do not so understand those cases. \* \* \* The necessity of giving due notice of the dishonor of a bill which has been refused acceptance, is not, in our opinion, dispensed with in those cases. \* \* \* 7

#### V. Effect of dishonor of bill presented for acceptance.

§ 248

UNION NAT. BANK *v.* MARR'S ADM'R.

[Reported herein at p. 573.]

<sup>4</sup> But see *Smith v. Bank*, L. R. 4 P. C. 194; 2 Daniel, § 1178. — H.

<sup>5</sup> Excuse for delay is to be distinguished from excuse from presentment altogether. *U. S. v. Barker*, 1 Paine, (U. S. C. C.) 156, 163; *Aymar v. Beers*, 7 Cow. (N. Y.) 705; 1 Daniel, § 478. — H.

<sup>6</sup> Reported also in 4 Wash. C. C. 464. — C.

<sup>7</sup> See also *Nat. Park Bank v. Saitta*, 127 App. Div. (N. Y.) 624. — C.



## § 248

WINTHROP *v.* PEPOON.

1 BAY (So. CAR.) 468. — 1795.

[ACTION against drawer of bill, brought before time for payment had expired. The bill was presented for acceptance, dishonored, and duly protested.]

Upon the first ground, the court were clearly of opinion, that the action lay upon the protest for non-acceptance, although the time for payment of the bill was not expired. Every man, by the law of merchants, who draws a bill, undertakes by the very act of drawing that the bill shall be accepted and paid, when at maturity, agreeable to the terms of the bill. And the very end and design of a protest, is to give notice of non-acceptance; or, if accepted, of non-payment; in either event, the drawer becomes liable. And the holder, in case of a protest for non-acceptance, is under no obligation to wait till the time for payment expires; because the drawer has broke part of his original contract, that is, that the bill should be accepted; and because also (if the bill should even be paid when due), the holder would lose the benefit of the credit in trade, which the acceptance of a bill would give him, as well as the use of the money, which he might obtain at a small discount. The obligation in every such case would be on the part of the defendant to show that the bill was afterwards paid, which might be given in evidence by way of mitigation of damages. But in this case, no payment, even at this day, is alleged; therefore, the plaintiff is entitled to a recovery. (Doug. 55; 3 Will. 17; Kyd, 17.)<sup>1</sup>

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<sup>1</sup> If a right of action arises on presentment for acceptance, no new right arises on presentment for payment. *Whitehead v. Walker*, 9 M. & W. 506. See *Robinson v. Ames*, 20 Johns. 146, *ante*, p. 681; *Sterry v. Robinson*, 1 Day, (Conn.) 11. But if there is an acceptance for honor or a reference in case of need, there must be a presentment for payment, and protest for non-payment, before presentment to the acceptor for honor or referee in case of need. Neg. Inst. L., § 286.—H.

[See also *Nat. Park Bank v. Saitta*, 127 App. Div. (N. Y.) 624. — C.]

## ARTICLE XIII.

### PROTEST OF BILLS OF EXCHANGE.

#### I. What instruments must be protested.

§ 260                      SUSSEX BANK *v.* BALDWIN.

[*Reported herein at p. 480.*]<sup>1</sup>

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#### II. What constitutes sufficient protest.

§ 261                      DENNISTOUN *v.* STEWART.

17 HOWARD (U. S.) 606. — 1854.

MR. JUSTICE GRIER delivered the opinion of the court.

The plaintiffs declared against the defendant, as drawer of a bill of exchange, by the name and style of James Reid and Co., of which the following is a copy:—

No.—. £4,417 14s. 11d. st'g.

MOBILE, *Sept.* 9, 1850.

Sixty days after sight of this first of exchange, (second and third unpaid), pay to the order of ourselves, in London, forty-four hundred and seventeen pounds, 14s. 11d. st'g, value received, and charge the same to the account of 1,058 bales of cotton per 'Windsor Castle.'

Your obedient servants,

Pr. pro. JAMES REID AND Co.,

WM. MOULT, JR.

To H<sup>y</sup>. GORE BOOTH, Esq., Liverpool.

[Acceptance across the face of the bill:]

Seventh October, 1850. Accepted for two thousand five hundred and seventy-one pounds eighteen shillings and seven pence, being balance unaccepted for acct. 1,058 b. cotton, pr. Windsor Castle, payable at Glyn and Co.

Pr. pro. HENRY GORE BOOTH.

AND. E. BYRNE.

Due 9 Decem.

[Indorsed:]

Pay MESSRS. A. DENNISTOUN AND Co., or order.

Pr. pro. JAMES REID AND Co.

WM. MOULT, JR.

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<sup>1</sup> As to protest of inland bills and promissory notes, see *Neg. Inst. L.*, § 189. See also *Shaw v. McNeill*, 95 N. C. 535, *ante*, p. 584. Protest is now necessary in three cases: (1) foreign bills; (2) bills accepted for honor; and (3) bills containing a reference in case of need, if the holder desires to resort to the referee. *Neg. Inst. L.*, § 286. Protest is proper, but not necessary, in two cases (1) inland bills and promissory notes; (2) for better security, § 266. The protest for non-payment after protest for non-acceptance is anomalous; it may be necessary to meet the requirements of foreign law, § 265. — H.

After reading this bill, with its indorsements, the plaintiff offered in evidence a regular protest, indorsed on a copy of a bill agreeing in every particular with the above, except that for "And. E. Byrne" was written "Chas. Byrne."

The defendant objected to the reading of the protest in evidence, because it did not describe the bill of exchange produced by the plaintiffs, but a different bill. The court sustained this objection, and excluded the protest from the jury, which is the subject of the first bill of exceptions.

A protest is necessary by the custom of merchants in case of a foreign bill, in order to charge the drawer. It is defined to be in form "a solemn declaration written by the notary under a fair copy of the bill, stating that the payment or acceptance has been demanded and refused, the reason, if any, assigned, and that the bill is, therefore, protested."

A copy of the bill, it is said, should be prefixed to all protests, with the indorsements transcribed *verbatim*. (1 Pardess. 444; Chitty on Bills, 458.)

However stringent the law concerning mercantile paper, with regard to protest, demand, and notice, may appear, it is nevertheless founded on reason and the necessities of trade. It exacts nothing harsh, unjust, or unreasonable. A protest, though necessary, need only be noted on the day on which payment was refused. It may be drawn and completed at any time before the commencement of the suit, or even before the trial, and consequently may be amended according to the truth, if any mistake has been made.<sup>2</sup>

The copy of the bill is connected with the instrument certifying the formal demand by the public officer, as the easiest and best mode of identifying it with the original. Mercantile paper is generally brief, and without the verbiage which extends and enlarges more formal legal instruments. Hence, it is much easier to give a literal copy of such bills, than to attempt to identify them by any abbreviation or description. The amount, the date, the parties, and the conditions of the bill, form the substance of every such instrument. Slight mistakes, or variances of letters, or even words, when the substance is retained, cannot and ought not to vitiate the protest. A lost bill may be protested, when the notary has been furnished with a sufficient description, as to date, amount, parties, etc., to identify it.

In indictments for forgery, it is not sufficient to state the "substance and effect" of the instrument; it must be laid according to the "tenor," or exact letter; but the law merchant demands no such stringency of construction. The sharp criticism indulged when

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<sup>2</sup> See § 263. — H.

the life of a prisoner is in jeopardy cannot be allowed for the purpose of eluding the payment of just debts.

It is unnecessary that a copy of the protest should be included in the notice to the drawer and indorsers.<sup>3</sup> The object of notice is to inform the party to whom it is sent that payment has been refused by the maker, and that he is held liable. Hence, such a description of the note as will give sufficient information to identify it, is all that is necessary. What was said by Mr. Justice Story, in delivering the opinion of this court, in *Mills v. The Bank of the United States*,<sup>4</sup> with regard to variances and mistakes in notices, will equally apply to protests: "It cannot be for a moment maintained that every variance, however immaterial, is fatal. It must be such a variance as conveys no sufficient knowledge to the party of the particular note which has been dishonored. If it does not mislead him, if it conveys to him the real fact, without any doubt, the variance cannot be material, either to guard his rights or avoid his responsibility."

In the case before us, the protest had an accurate copy of every material fact which could identify the bill—the date, the place where drawn, the amount, the merchandise on which it was drawn, the ship by which it was sent, the balance on the cotton for which it was accepted, the names of drawers, acceptor, indorsers; in fine, everything necessary to identify the bill. The only variance is a mistake in copying or deciphering the abbreviations and flourishes with which the christian name of the acceptor's agent is enveloped. The abbreviation of "And." has been mistaken for Chas., and the middle letter E. omitted. The omission of the middle letter would not vitiate a declaration or indictment. Nor could the mistake mislead any person as to the identity of the instrument described.

We are of opinion, therefore, that the objection made to this protest, "that it does not describe the bill of exchange produced, but a different bill," is not true in fact, and should have been overruled by the court.

This renders it unnecessary for us to notice the offer of testimony to prove the identity, which was also overruled by the court.

The judgment of the Circuit Court is reversed, and *venire de novo* awarded.

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<sup>3</sup> Nor even mention of protest. *Ex parte Lowenthal*, L. R. 9 Ch. 591. Nor is the certificate of protest evidence of notice, except by statute. *Bank v. Gray*, 2 Hill (N. Y.) 227, *ante*, p. 589. — H.

<sup>4</sup> *Ante*, p. 539.— H.

## § 261

CAYUGA COUNTY BANK *v.* HUNT.

2 HILL (N. Y.) 635. — 1842.

ASSUMPSIT. \* \* \* The action was by the plaintiffs as indorsees against the defendant as indorser of a bill of exchange drawn by James Treat on Stephen Sicard & Co., New York, and accepted by them.

The bill, which bore date January 16th, 1839, was payable to the order of the defendant at ninety days; and no place of payment was mentioned therein. On the trial, after proving the signature of the defendant as indorser, the plaintiffs gave in evidence a notarial certificate of protest, stating that on the 19th day of April, 1839, the notary presented the bill in question at No. 4 Wall street, the office of the acceptors, but found the same closed and no person there of whom payment could be demanded; that he then presented the same to the widow of Stephen Sicard, for payment, which she refused, saying that the partner of her late husband was at the South, and she knew nothing of it. The plaintiffs also read in evidence a notarial certificate, stating that notice of protest of the bill in question had been duly given to the defendant. This certificate was dated February 9th, 1841, nearly two years after presentment and protest. No further evidence was offered by the plaintiffs. The defendant's counsel moved for a nonsuit, on the ground, 1. That the presentment of the bill in question to the widow of Stephen Sicard, deceased, was insufficient to charge the indorser; 2. That it did not appear from the certificate of protest that the bill was presented for payment to any person at the office of S. Sicard & Co., or that the notary called for that purpose during office hours; and 3. That the certificate of notice of protest was not given till nearly two years after protest was made. The judge denied the motion, and the defendant excepted.

*By the Court,* COWEN, J. — The bill of exchange was payable generally, mentioning no place. The drawees were Stephen Sicard & Co., who accepted the bill as a firm, thus becoming joint debtors. On the death of Sicard, he was discharged at law, the liability developing on the surviving partner (Story on Partn., § 361, 362), to whom alone the plaintiffs were bound to have the bill presented for payment. The mode, therefore, in which the bill was presented to the widow and supposed personal representative of Sicard, or whether she were in fact his representative, becomes entirely unimportant.

No objection was made at the trial that the presentment, which was at No. 4 Wall street, where the survivor transacted business, should have been at his residence or any other place. Therefore the question on the place of presentment does not arise. It must be

taken to have been proper. Not was the manner of presentment denied to be proper; nor the day.

But it is objected that the time of day should have been mentioned in the notary's certificate; for perhaps it might have been after the hours of rest. The certificate states that it was presented on the third day of grace. This, coming from a witness on the stand, would be deemed *prima facie* evidence of presentment at a proper time in the day; and if an improper hour were in truth selected, it would lie with the adverse party to show the fact by cross-examination or otherwise. It would not be intended that a late hour was resorted to. We think, therefore, that the certificate, in fair construction, imports a presentment during the proper hours of business. These, except where the paper is due from a bank, generally range through the whole day down to bed-time in the evening. (Chitty on Bills, 421 [r.], Am. ed. 1839, and cases there cited.) It would be quite a forced presumption on the words of an officer saying he presented on such a day, to fix the hour either before or after that when business is usually transacted. It would be to suppose the notary, at the expense of his own convenience, going at an improper hour for the mere sake of doing wrong.<sup>5</sup>

It is no objection that the certificate of notice was drawn up by the notary two years, or any other length of time, after notice was given. The statute gives it as a substitute for his personal testimony at the trial. It is properly called for and may be drawn up when it happens to be wanted as evidence. The notary cannot be expected always to prepare it as a matter of course; for *non constat* it may ever be wanted. It was said on the argument, that ordinarily it is drawn up and transmitted to the holder at or about the time when the business is done. That is the better practice; but it is not essential.

[Omitting a question of usury.]

New trial denied.

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<sup>5</sup> "Went with the draft to the bank and demanded payment," is sufficient. *Bank v. Cameron*, 7 Barb. (N. Y.) 143. "Went with the note and made demand at maker's office and person in charge answered, 'No funds,'" is sufficient. The maker is entitled to have the note exhibited, yet if he does not ask to see it, and refuses payment on other grounds, the presentment is sufficient. *Legg v. Vinal*, 165 Mass. 555.

A certificate that the notary presented the draft to "one of the firm of Warren, Clark & Co.," is insufficient for not stating the name of the person on whom demand was made. *Otsego Co. Bank v. Warren*, 18 Barb. (N. Y.) 290. — H.

§ 263 MORELAND'S ADMINISTRATOR *v.* CITIZENS'  
NATIONAL BANK.

114 KENTUCKY, 577. — 1903.

OPINION of the court by Judge Paynter —

The issue herein arises over certain bills of exchange. There is no issue as to the drawing, acceptance, and indorsement of them. In this action it is sought to hold the accommodation drawer and indorser responsible on them. The payment is sought to be avoided by the drawer and indorser of same on the grounds that the law was not observed in noting protest, giving notice of protest, and writing the instruments of protest by the notaries public. Two of the bills over which there is a controversy are for \$5,000 each, one for \$3,685, one for \$3,000, and one for \$3,200. These bills were drawn by J. P. Moreland, accepted by S. D. Walden, and indorsed by J. P. Fuqua. It appears that the bills (unless the one for \$3,685 was not) were protested on the days that they matured. As to that bill it is insisted that it was not protested until the day after its maturity. That defense is interposed in addition to the others heretofore stated. I. N. Parish, notary public, protested the bills for \$5,000 each on the days of their maturity, and indorsed on them, "Protested for nonpayment," and, in addition to that, gave the day of the month and year, to which indorsement he affixed his official signature. W. H. Moore was the notary who protested the bill for \$3,000 and the one for \$3,200. No memorandum noting the protest was left attached to either of the bills by the notary, nor was such indorsement made upon them. Either on the day the bills were protested or on a subsequent day the instruments of protest were written, but the evidence leaves no doubt that the notices of protest were duly mailed to the drawer and indorser of the several bills on the days they were protested.

The first thing which we will consider is whether the noting by Parish was sufficient. The authorities seem to be agreed that the noting of initial protest was unknown to the law as distinguished from the protest, but that it has grown into practice within recent years. It seems to be well established that, if the instruments of protest are not written shortly after the demand and protest, the noting or initial protest is necessary as a basis for the instrument of protest. 2 Dan. Neg. Inst. (4th Ed.), section 939. This court in *Read v. Bank*, 1 T. B. Mon., 93, 15 Am. Dec., 86, had under consideration the question as to the necessity of noting. The court said: "The protest was drawn up so soon as the ordinary course of business would permit, or at least in sufficient time to supersede the necessity of noting the bill at the moment." The court seemed to be of the opinion that, if the instrument of protest was written as

soon as the ordinary course of business would permit, or at least in sufficient time to supersede the necessity of noting the bill at the moment, then those sought to be held liable were bound. We are of the opinion that the indorsements which Parish made on the bills were sufficient.

The facts as to the bills protested by Paris differ somewhat from those protested by Moore. We will not go into the discussion of the question of the competency of evidence to prove the course of business of notaries in protesting paper; neither is it necessary for us to determine whether the instruments of protest were written on the day the bills matured, or on a subsequent day; hence the necessity is obviated of determining whether the proof is sufficient to impeach the dates of the instruments of protest, they bearing dates that the bills matured. If the noting of protest was made, the instruments of protest could have been prepared thereafter. Moore testified that when he protested the bills he attached to each of them a memorandum showing the protest, but when the instruments of protest were written he destroyed it, as he had no further use for it. Counsel for appellee urges that the preservation of these slips was essential to the validity of the protest *in extenso*, as they form a necessary part of the record in establishing the steps that must be taken in order to fix liability upon the drawer and indorser. The object of noting is to have a record from which the instrument of protest can be written, so a notary will not be required to rely upon his memory as to the facts. If the noting was made, the destruction of it, whether it was purposely or accidentally done, could not invalidate the instrument of protest which was based upon it. It preserves the right of the notary to prepare that instrument, and, when done, the essential steps have been taken to fix the liability upon the accommodation drawer and indorser. The bill having been protested for non-payment and notice having been given to the drawer and indorser, the noting having taken place, and the instrument of protest having been executed, the liability of the drawer and indorser was fixed. The destruction of the paper upon which the noting was made could not relieve them of the liability that had attached by the necessary act of the notary.

After the several bills were drawn, and before their maturity, Moreland made an assignment to E. P. Taylor for the benefit of his creditors. When the bills were protested, notices of protest were not sent to the assignee, but to Moreland. It is insisted that, as the assignee accepted the trust, and qualified as such assignee, notices of protest should have been given to him, instead of to Moreland, in order to bind the trust estate. The exact question here presented has not been before this court, although this court, in *Callahan v. Bank*, 82 Ky., 231, 6 R., 188, held that notice of the dishonor of a bill to one who is the assignee of the payee was sufficient. But the



court said: "We must not be understood as determining whether a notice of the dishonor of negotiable paper sent to the bankrupt or insolvent alone, and not to the assignee, would or would not be sufficient, as that question is not presented in this case." The text-writers upon this question are extremely unsatisfactory. 1 Pars. Notes & B., 500, in speaking of the person to whom notice of protest should be given in the case of a bankrupt, says: "That perhaps the notice should be given to the assignee, if the holder knows or might know, by the exercise of due diligence, that the estate is in his hands:" but he adds: "But notice might perhaps even then be sufficient if given to the bankrupt." Byles, Bills, page 216 says: "If the drawer of the bill become bankrupt, notice must nevertheless be given to him, in all events, before the choice of assignees. If the assignees are appointed, perhaps notice should be given to them." Daniel, Neg. Paper, section 1002, says: "If the party be bankrupt, it is best to give notice to him, and to his assignee also. If there be yet no assignee appointed, notice to him is sufficient, and perhaps it might be sufficient, even if one had been appointed. If given to the assignee alone, it would probably be sufficient." When a party assigns all of his property for the benefit of his creditors and places it in the hands of a trustee for distribution, all of his creditors are entitled to participate in the distribution of it. This is true whether the debts have matured or not. Moreland's liability on these bills existed at the time of the assignment, and, if it was preserved, then the holder of them was entitled to participate in the distribution of the proceeds of the assigned estate. He being personally liable to the holder, it was important to it that he receive notice of protest that that liability might be preserved. When that liability was preserved, it seems to us to necessarily follow that the holder of the bills is entitled to participate in the trust estate, because the very purpose of his assignment was to pay his liabilities in full or pro rata, as the case may be. We conclude that notice to Moreland was sufficient to preserve his liability, and, if his liability continued, there is no escape from the conclusion that the holder of the bills which evidenced it was entitled to participate in the distribution of the estate. \* \* \*

The judgment is affirmed.

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### III. By whom protest should be made.

#### § 262

#### CARTER *v.* UNION BANK.

7 HUMPHREY (TENN.) 548. — 1847.

GREEN, J., delivered the opinion of the court.

This is an action against the plaintiff in error, as the indorser of a bill of exchange drawn in Memphis, Tennessee, by Arthur Bowen

on Fort and Wilcox, New Orleans, in favor of plaintiff in error, for \$2,500, and by him indorsed. The bill was presented at maturity, payment demanded and was protested for non-payment by A. B. Cends, a notary public of New Orleans. The instrument of protest states, that the notary "by his deputy, McDime, Jr., presented said draft to Mr. Fort, one of the members of the firm of Fort and Wilcox, the acceptors, at their office, and demanded payment thereof, and was answered that the same would not be paid." The protest was made the 11th June, 1845.

By an act of the General Assembly of Louisiana, passed the 14th of March, 1844, it is made lawful, for each and every notary public in New Orleans, to appoint one or more deputies, to assist him in making of protests and delivery of notices of protests of bills of exchange and promissory notes: Provided, that each notary shall be responsible for the acts of each deputy employed by him; and provided, that each deputy shall take an oath, faithfully to perform his duties as such, before the judge of the parish in which he may be appointed; and provided, the certificate of notice of protest shall state by whom made or served.

The defendant, at the trial below, objected to the protest which was offered as evidence, which objection was overruled by the court, and the evidence was admitted. The jury found a verdict for the plaintiff, and the defendant appealed to this court.

It is now insisted, that this protest is not evidence of the presentment and demand of the bill, because it states that the demand was made by the deputy of the notary.

It is certainly true, as the general rule, that a foreign bill must be presented by the notary in person, and demand of payment made by him, and that the demand by his deputy is not sufficient. But it is seen, that the law of Louisiana, where this bill was payable, authorizes the employment of a deputy in this service, and that the protest must certify by whom the demand was made.

In Story on Bills (§ 276), treating of protest of foreign bills, it is laid down, that the protest "should be made out and drawn up in the form required by the law or usage of the place where it is made, and that so essential is the production of the protest, that it cannot be supplied by mere proof of noting for non-acceptance, and a subsequent protest for non-payment." And Mr. Chitty observes (Chitty on Bills, 333), "whenever notice of non-acceptance of a foreign bill is necessary, a protest must also be made, which, though mere matter of form, is by the custom of merchants indispensably necessary, and cannot be supplied by witnesses or oath of the party, or in any other way, and, as it is said, is a part of the constitution of a foreign bill of exchange." The mere production of this protest, in the case of a bill payable and protested out of the country, will be evidence of its dishonor, "and to it all foreign courts give credit."

And at page 456, he says: "With respect to the protest, it should always be made according to the law of the place where the payment ought to have been made, though, with regard to notice of dishonor, it must be given to the drawer within the time, and according to the law of the place where the bill was drawn, and to the indorsers according to the law of the place where the indorsements were made."

These authorities settle the question, and establish the following propositions:—

1. That a protest is indispensable to the dishonor of a foreign bill of exchange.

2. That the protest is to be made according to the law of the place where the bill is payable.

3. That the protest properly authenticated, is evidence by its mere production, of the presentment and demand, in all foreign courts, where the dishonor of the bill is required to be proved.

4. That no other evidence of the facts stated in the protest is competent.

The protest in the present case was made according to the law of Louisiana, where the bill was payable, and, therefore, is evidence here of the dishonor of the bill.

It is objected, that there is no evidence that Memphis was the defendant's place of residence.

It appears, that annexed to the name of the defendant on the bill is added "Memphis, Tennessee." This we regard as part of his indorsement, and as sufficient authority to authorize the holder to send the notice to Memphis.

Affirm the judgment.<sup>6</sup>

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<sup>6</sup> "In many cases, even with regard to foreign bills of exchange, the protest may, in the absence of a notary, be made by other functionaries, and even by merchants. But where, as in Mississippi, a justice of the peace is authorized by positive law to perform the functions and duties of a notary, there is no ground to say that his act of protest is not equally valid with that of a notary. *Quoad hoc* he acts as a notary."—Mr. Justice Story in *Burke v. McKay*, 2 How. (U. S.) 66, 72 (1844). Conf. *Todd v. Neal's Adm'r*, 49 Ala. 273; *Read v. Bank*, 1 T. B. Mon. (Ky.) 92. Costs for protest cannot be allowed where the protest is by a private individual not authorized to charge fees. *Read v. Bank*, *supra*.—H.

## ARTICLE XIV.

### ACCEPTANCE FOR HONOR.<sup>1</sup>

BYTES, BILLS OF EXCHANGE, ETC. (13TH ED.), 1879.

#### [CHAPTER XX.]

WHEN acceptance is refused, and the bill is protested for non-acceptance, or where it is protested for better security, any person may accept it *supra protest*,<sup>2</sup> for the honor of the drawer or of any one of the indorsers. The method of accepting *supra protest* is said to be as follows, viz.: The acceptor *supra protest* must personally appear before a notary public, with witnesses, and declare that he accepts such protested bill in honor of the drawer or indorser, as the case may be, and that he will satisfy the same at the appointed time; and then he must subscribe the bill with his own hand, thus — “Accepted *supra protest* in honor of A. B.,” etc.,<sup>3</sup> or, as it is more usual, “Accepts S. P.” And a general acceptance *supra protest* which does not express for whose honor it is made is considered as made for the honor of the drawer.<sup>4</sup>

Any person may accept a bill *supra protest*; and the drawee himself though he may refuse to accept the bill generally, may yet accept it *supra protest*, for the honor of the drawer or of an indorser.<sup>5</sup> And

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<sup>1</sup> Called in French, “Acceptation par Intervention,” Code de Commerce, 126. Byles, Ch. XX.

<sup>2</sup> I am not aware of any authority to show that there may be an acceptance for honor without a protest, and the statute 6 & 7 Will. 4, c. 58, seems to assume that bills accepted for honor are always protested: see *Vandewall v. Tyrrell*, M. & M. 87; *Geralopulo v. Wieler*, 10 C. B. 690; Bayley (6th ed.), 181; Nouguiet, *Lettres de Change*, §§ 584–591. Unless, indeed, there be a direction to another person in case of need: Chitty 165, 236. Where the direction, in case of need, is appended, it is said to be necessary to present a foreign bill to that other person. But then he is more properly an original alternative drawee than an acceptor for honor. As to a direction “in case of need” on an indorsement, see *Leonard v. Wilson*, 2 C. & M. 589. There seems from that case no obligation to present an inland bill (where the direction in case of need is given by an indorser) to the party to whom, in case of need, it may be presented. The referee, in case of need, appointed by the indorser, though agent to pay the bill is not agent to receive notice of dishonor: *In re Leeds Banking Company*, Law Rep. 1 Equity 76; 35 L. J. Ch. 33.

<sup>3</sup> Beawes, pl. 38.

<sup>4</sup> Chitty (9th ed.), 344; Beawes 39.

<sup>5</sup> Beawes 33. And it has been held in America that it is no objection that the acceptor *supra protest* takes the guarantee of the drawee. Byles on Bills (6th American edition), 403.

though we have seen that, after one general acceptance, there cannot be another acceptance,<sup>6</sup> yet, when a bill has been accepted *supra protest*, for the honor of one party, it may, by another individual, be accepted *supra protest*, for the honor of another.<sup>7</sup> In no one case is the holder obliged to take an acceptance for honor.<sup>8</sup>

The holder of a dishonored bill, who is offered an acceptance for the honor of some one of the preceding parties to the bill, should first cause the bill to be protested, and then to be accepted *supra protest*, in the manner above described. At maturity he should again present it to the drawee for payment, who may, in the meantime, have been put in funds by the drawer for that purpose. If payment by the drawee be refused, the bill should be protested a second time for non-payment,<sup>9</sup> and then presented for payment to the acceptor for honor.<sup>1</sup> Doubts having arisen as to the day when the bill should be again presented to the acceptor for honor, or referee, in case of need, for payment, the 6 and 7 Will. 4, c. 58, enacts that it shall not be necessary to present, or in case the acceptor for honor or referee live at a distance, to forward for presentment, till the day following that on which the bill becomes due.<sup>2</sup>

In a case which attracted much attention, it was proved that where a foreign bill, drawn upon a merchant residing in Liverpool, payable in London, is refused acceptance, the usage is to protest it for non-payment in London. The bill is put into the hands of a notary, and he formerly used to make protest at the Royal Exchange, but that custom is obsolete: the notary now is merely desired by the holder to seek payment of the bill, and on a declaration by the holder that the drawee has not remitted any funds, or sent to say where the bill will be paid, the notary at once marks it as protested for non-payment. The court (with the exception perhaps of Mr. J. Bayley), seemed to think this might, if the bill were payable in London, be, in ordinary cases, sufficient. But they were all agreed that it would not have been sufficient in the principal case to charge the acceptor *supra protest*, because the acceptance was in these words,—"If regularly protested and paid when due," and they said the drawees could not be said to refuse unless they were asked. The court also appear to have been clear that, though there might be cases in which an exhibition of the bill to a notary in London is suffi-

<sup>6</sup> *Jackson v. Hudson*, 2 Camp. 447.

<sup>7</sup> Beawes, pl. 42.

<sup>8</sup> *Nutford v. Walcott*, 12 Mod. 410; 1 Ld. Raym. 575, s. c.; Beawes, 37; *Gregory v. Walcup*, Comb. 76; *Pillans v. Van Mierop*, 3 Burr, 1663.

<sup>9</sup> *Hoare v. Casenove*, 16 East, 391.

<sup>1</sup> *Williams v. Germaine*, 7 B. & C. 477, 1 M. & R. 394, s. c.

<sup>2</sup> According to the French law the acceptor for honor is bound to give notice to the person for whose honor he accepts. Code de Commerce, 127, 128.

cient, yet that in all cases a bill *may* be sent to the drawee, and indeed that such is the more regular course.<sup>3</sup>

By the 2 and 3 Will. 4, c. 98, it is enacted that all bills made payable by the drawee in any place other than his residence are, on non-acceptance, to be without further presentment protested for non-payment in the place where they are made payable.

The undertaking of the acceptor *supra protest* is not an absolute engagement to pay at all events, but only a collateral conditional engagement to pay if the drawee do not. "It is," says Lord Ellenborough, "an undertaking to pay, if the original drawee, upon a presentment to him for payment, should persist in dishonoring the bill, and such dishonor by him be notified by protest to the person who has accepted for honor."<sup>4</sup> The learned judge proceeds to lay down the doctrine that a second protest is necessary; observing: The use and convenience, and, indeed, the necessity of a protest upon foreign bills of exchange in order to prove, in many cases, the regularity of the proceedings thereupon, is too obvious to warrant us in dispensing with such an instrument in any case where the custom of merchants, as reported in the authorities of law, appears to have been required.<sup>5</sup> And a second protest, for non-payment by the drawee, is, after acceptance *supra protest*, equally necessary, in order that either the holders may charge the acceptor *supra protest*, or the acceptor *supra protest* may charge the party for whose honor the acceptance was given. The object of an acceptance for honor is to save to the holder all those rights which he would have enjoyed had the bill been accepted in a regular manner. If the bill be drawn payable at a certain period after sight, and accepted *supra protest*, a second presentment for payment, and a protest and notice, is still essential for the purpose of enabling the holder to sue either drawer or acceptor *supra protest*, or enabling the latter to sue the party for whose honor he has accepted. And the time which the bill has to run is computed, not from the date of the exhibition to the drawee, but from the date of the acceptance *supra protest*.<sup>6</sup> Presentment to the drawee, and protest, must be averred in the

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<sup>3</sup> *Mitchell v. Baring*, 10 B. & C. 4; M. & M. 381; 4 C. & P. 35.

<sup>4</sup> *Hoare v. Cazenove*, 16 East, 391. See *Vandewall v. Tyrrell*, M. & M. 87. In America it is held that where a draft has been protested for non-acceptance, the holder is not bound to present it at maturity for payment: *Exeter Bank v. Gordon*, 8 New Hamp. 66. But this is not so when there has been an acceptance *supra protest*. An acceptor for the honor of the drawer cannot recover against him without proof of presentment for acceptance or payment and refusal, and notice to the drawer: *Baring v. Clark*, 19 Pick. 220. He who accepts *supra protest* is not liable unless demand of payment is made on the drawee and notice of the refusal given: *Schofield v. Bayard*, 3 Wendell, 491.

<sup>5</sup> *Ibid*.

<sup>6</sup> *Williams v. Germaine*, 7 B. & C. 468; 1 Man. & R. 394, 403, s. c.

declaration.<sup>7</sup> The acceptor *supra protest* becomes liable to all parties on the bill subsequent to him for whose honor the acceptance was made.<sup>8</sup>

The acceptor *supra protest* admits the genuineness of the signature, and is bound by any estoppel binding on the party for whose honor he accepts. Thus, where a bill was drawn in favor of a non-existing person or order, but the name of the drawer and the name of the payee and first indorser were both forged and the defendant accepted for the honor of the drawer, it was held that the defendant was estopped from disputing that the drawer's signature was genuine, and that the bill was drawn in favor of a non-existing person, was negotiable, and had become payable to bearer.<sup>9</sup>

By acceptance *supra protest*, the party for whose honor it was made, and all parties antecedent to him, become liable to the acceptor *supra protest* for all damages which he may incur by reason of his acceptance.<sup>1</sup> The acceptor *supra protest*, where the bill has been protested for better security, has his remedy also against the acceptor.<sup>2</sup> It was once held<sup>3</sup> that a party paying for the honor of the drawer had no claim on the assignees of the accommodation acceptor, because the drawer himself had none; but in a recent case it was decided that he could recover against the acceptor whether the acceptance were given for value or not.<sup>4</sup>

## SCHOFIELD v. BAYARD AND OTHERS.

3 WENDELL (N. Y.) 488. — 1830.

THIS was an action of assumpsit, tried at the New York circuit in January, 1828, before the Hon. Ogden Edwards, one of the circuit judges.

The defendants drew a bill of exchange in the name of Le Roy, Bayard & Co., (the name of their firm), dated New York, 15th August, 1825, upon Messrs. Crowder, Clough & Co., of Liverpool, for £1,000 sterling, payable in London, at 60 days after sight, to Mr. E. Peterson, or order, and by him indorsed to the plaintiffs, merchants of

<sup>7</sup> Ibid.

<sup>8</sup> *Hoare v. Cazenove*, 16 East, 391; Bayley (6th ed.), 178; Beawes, 33; Marius, 21; *Ex parte Wackerbath*, 5 Ves. 574.

<sup>9</sup> *Phillips v. Im Thurm*, L. R., 1 C. P. 220.

<sup>1</sup> Beawes, 47.

<sup>2</sup> *Ex parte Wackerbath*. 5 Ves. 574.

<sup>3</sup> *Ex parte Lambert*, 13 Ves. 179.

<sup>4</sup> *Ex parte Swan*, L. R., 6 Eq. 344. In America it is held that if a third party takes up a bill at its maturity for the honor of the drawer, and at his request, he thereby releases the accommodation acceptor of such bill, whether he intended it or not. See Byles on Bills (6th American ed.), 406.

Birmingham. The bill was protested for non-acceptance on the 10th September, and notice given to the defendants on the 17th October, after which Baring Brothers & Co., of London, accepted it *supra protest* in these words: "Accepted under protest and account for honor of the drawers, and will be paid for their account if needful, and regularly presented when due." The bill was subsequently sent to Liverpool to be presented to the drawees for payment. The correspondents of the plaintiffs at Liverpool, on the 10th November, enclosed the bill to the plaintiffs in a letter, with advice that the presentation should be made in London, and the letter was put in the post-office on the same day, in season for the mail for Birmingham on that day, but by some oversight of the clerks in the post-office it was not sent until the next day, and consequently did not reach the latter place until the 12th November, which was Saturday. The bill could not be forwarded to be presented in season on that day, and Monday after was too late. Had the letter been forwarded from Liverpool on the 10th by the mail which left there on the evening of that day, it would have reached Birmingham about 11 o'clock A. M. of the next day, and might have been forwarded from thence to London by mail on the afternoon of the same day at 4 P. M., and would have reached London in sufficient time for the general delivery of letters, between 9 and 10 o'clock on the following morning, which would have been in season. The bill reached London on the 14th November, and payment was demanded of Messrs. Baring Brothers & Co., who gave the following answer in writing: "Baring Brothers & Co., accepted this bill conditionally, viz., to pay it if needful and regularly presented when due. The bill is expressly made payable in London, where payment should have been sought on the 12th inst.; that has not been done, and therefore they consider their friends, Messrs. Le Roy, Bayard & Co., as well as themselves, are acquitted from all liability by such irregularity." The bill was protested for non-payment, and notice given to the defendants on the 10th January, 1826. Messrs. Crowder, Clough & Co. were bankrupts when the bill was drawn, the drawers had no funds in their hands, and the bill would not have been paid by them had it been presented to them for payment when due. A verdict was taken for the plaintiffs for the principal, damages, exchange, and interest, subject to the opinion of this court on a case made.

*By the Court*, SAVAGE, CH. J. — Where a bill is accepted *supra protest*, the holder must demand payment, and if refused, notice of such refusal must be given. Such acceptance is a conditional engagement; and to render such acceptor absolutely liable, the bill must be duly presented for payment to the drawee, and protested in case of refusal. (Chitty on Bills, 242; 16 East, 391.) The above authorities say the payment must be demanded of the drawees; but if the



bill is payable at a particular place, payment must be demanded at that place.

In this case the only real question is, whether the holder is excused by reason of the mistake in the post-office at Liverpool, from not making demand in season.<sup>5</sup> It is proved in this case that the drawees were bankrupt when the bill was drawn, and had no funds of the drawers at that time or since, and that at no time would they have accepted or paid the bill. It does not appear, however, that the bill would not have been paid by the acceptors had it been regularly demanded. In the case of *Patience v. Townley* (2 Smith, 223), a bill drawn on Leghorn, due the 10th September, 1800, was not demanded till the 31st December; Leghorn being then occupied by the enemy, or in some such critical situation, it was impossible to present it in season. The plaintiff had a verdict, which the court refused to set aside, Lord Ellenborough saying: "Duly presented, is presented according to the custom of merchants, which necessarily implies an exception in favor of those unavoidable accidents which must prevent the party from doing it within the regular time;" and it was left to the jury to say whether, from the situation of the country, it was impossible for the plaintiff to present it in due time. That cause presented a case of impossibility; but this case presents no impossibility, if due diligence had been used. The plaintiff should not have sent the bill to Liverpool at all. It is true, that after the letter containing it had been left at Liverpool on the 10th November, it could not have reached London in season; but it was the fault of the plaintiffs to have parted with the bill in the manner they did. Instead of sending it to Liverpool, they should have sent it to London, and then it would have been in season, and probably would have been paid.

I am of opinion, that, by the law merchant, payment should have been demanded in London on the 12th of November; and that not having been done, and there being no impossibility to prevent it but what is attributable to the want of due diligence on the part of the holders, the defendants are legally discharged, and are entitled to judgment.

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<sup>5</sup> See Neg. Inst. L., § 141. — H.

## ARTICLE XV.

### PAYMENT FOR HONOR.

BYLES, BILLS OF EXCHANGE, ETC. (13TH ED.) 1879.

#### [CHAPTER XXI.]

PAYMENT *supra protest* is where a bill of exchange, having been protested for non-payment, is paid by another person for the honor of some one of the parties. Any party to a bill of exchange, whether drawer, drawee, payee or indorser, may pay for honor. So may a mere stranger, without any previous request or authority from the party for whose honor he pays. This right is not founded on the English common law, but is a provision of the general law merchant, introduced to aid the credit and circulation of bills of exchange. It extends to no other instrument. Such payment should be preceded, on the part of the payer, in the presence of a notary public, by a declaration for whose honor the bill is paid, which should be recorded by the notary, either in the protest or in a separate instrument.<sup>1</sup> It is clear that there can be no payment for honor till the bill is dishonored by non-payment;<sup>2</sup> and a protest is essential,<sup>3</sup> though it may be drawn out in due form afterward.<sup>4</sup>

A party paying a bill of exchange *supra protest* has his action against the party for whom the payment was made, and against all other parties to whom the party could have resorted for reimbursement.<sup>5</sup> But he thereby discharges all the subsequent parties, although that discharge does not prevent his relying on any title they may have.<sup>6</sup>

A man paying for honor of an indorser may, if he choose, give immediate notice to the prior indorsers, but he is not bound so to do. He may, if he please, send the protest or the bill or notice to the indorser for whose honor he pays, and any subsequent regular notice given by that party ' will suffice.

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<sup>1</sup> Beawes, pl. 53; Marius, 128; Code de Commerce, art. 158.

<sup>2</sup> *Deacon v. Stodhart*, 2 Man. & Gr. 317.

<sup>3</sup> In *Vandewall v. Tyrrell*, 1 M. & M. 87, so held by Lord Tenterden; and in *Ex parte Wyld*, 30 L. J. Bky. 10, by Lord Campbell. As it is by the French Law, Code de Commerce, art. 158, and by the law of Scotland, Bell's Comm. b. 3, pt. 1, c. 4, § 367.

<sup>4</sup> *Geralopulo v. Wieler*, 10 C. B. 690.

<sup>5</sup> Bayley (6th ed.) 318.

<sup>6</sup> Code de Commerce, art. 159. In America it is held that an acceptor *supra protest*, for the honor of the first indorser, may require as a condition of payment that the holder shall indorse the bill to him. See Byles on Bills (6th American ed.), 408.

<sup>7</sup> *Goodall v. Polhill*, 14 L. J., C. P. 146; 1 C. B. 233.

It is conceived that a man cannot, by paying *supra protest*, revive the liability of an indorser already discharged by laches.

And where a party pays generally for honor, without a protest, a bill already indorsed in blank, he, as an indorsee, may, it seems, sue any party on the bill.<sup>8</sup>

The most obvious and advantageous course to be pursued by a man desiring to protect the credit of any party to a dishonored bill is simply to pay the amount to the holder and take the bill as an ordinary transferee.

But the holder may possibly object; for example, the bill may not have been indorsed in blank, and the holder may refuse to indorse even *sans recourse*. In such an event a payment *supra protest* becomes essential.

The party paying *supra protest* has also his remedy against the acceptor, and that whether the acceptance was given for value or not, unless there be an equity attached to the bill amounting to a discharge.<sup>9</sup>

It is necessary that the protest should be made before payment.<sup>1</sup>

The law merchant as to payment *supra protest* does not extend to promissory notes, which are not, like bills of exchange, instruments calculated or intended for circulation all over the globe. Whoever, therefore, pays a note for another person without authority, express or implied, does so at his peril.<sup>2</sup>

In ordinary cases, however, where the note is indorsed in blank, he of course becomes a transferee of the note.<sup>3</sup>

<sup>8</sup> *Mertens v. Winnington*, 1 Esp. 113. But see the observations on this case by Lord Campbell in *Ex parte Wylde*, 30 L. J. Bky. 10.

<sup>9</sup> *Ex parte Wackerbath*, 5 Ves. 574; *Ex parte Swan*, L. R., 6 Eq. 344, explaining and overruling *Ex parte Lambert*, 13 Ves. 179. A party taking up a bill for the honor of any party to it succeeds to the title of the party from whom he took it, and is in effect an indorsee by the law merchant, though he cannot himself indorse: Pothier, vol. 4, pt. 1, §§ 113, 114; Nougier, *Lettres de Change*, §§ 584-591.

<sup>1</sup> *Vandewall v. Tyrrell*, 1 M. & M. 87. Although it need not be drawn out in full, or extended, as it is called, till afterwards: *Geralopulo v. Wieler*, 10 C. B. 690.

<sup>2</sup> Story on Promissory Notes, § 453.

<sup>3</sup> Payment *supra protest* is a peculiarity of the law merchant. The payer for honor is practically in the position of an indorsee, except that he discharges all parties subsequent to the one for whose honor he pays. It has been held that one who pays for the honor of the drawer cannot recover against an accommodation acceptor. *McDowell v. Cook*, 14 Miss. 420; *Gazzam v. Armstrong*, 3 Dana (Ky.), 554; 2 Daniel, § 1255. But this doctrine was founded upon a misapprehension of the facts of *Ex parte Lambert* (13 Ves. 179), and the doctrine is distinctly repudiated in *Ex parte Swan*, L. R., 6 Eq. 344. By Neg. Inst. L., § 304, the payer for honor succeeds to the rights of the holder, both as to the party for whose honor he pays, "and all parties liable to that party." The clause quoted seems to leave the question of the liability of the accommodation acceptor still in doubt. — H.

## ARTICLE XVI.

### BILLS IN A SET.

BYLES, BILLS OF EXCHANGE, ETC. (13TH ED.) 1879.

#### [CHAPTER XXX.]

FOREIGN bills<sup>1</sup> are often drawn in parts, all the parts together making what is called a set.

Exemplars or parts of the bill are made on separate pieces of paper, each part being numbered, and referring to the other parts. Each part contains a condition that it shall continue payable only so long as the others remain unpaid. These parts should circulate together; or one may be forwarded for acceptance while the other is delivered to the indorsee, thus relieving him from the necessity of forwarding his part for acceptance, but giving him the indorser's security immediately, and diminishing the chances of losing the bill.<sup>2</sup> Every transferor is bound to hand over to his transferee all the parts of the bill in his possession, and he may even be liable to hand them over to a subsequent transferee, if he have them still in his possession.<sup>3</sup>

The whole set, of how many parts soever it be composed, constitutes but one bill,<sup>4</sup> and the regular payment and cancellation of any one of the parts extinguishes all.<sup>5</sup>

A firm, who were both payees and acceptors of a foreign bill in three parts, indorsed one part to a creditor to remain in his hands until some other security was given for it, and then indorsed another part of the same bill for value to a third person. They afterwards gave the first indorsee the proposed security, and took back the first part of the bill from him. Held, that the holder of the second part was not precluded from recovering against the firm: First, because the substitution of the security for the first part was not a payment; and secondly, because the firm were, as between themselves and the second indorsee, estopped from disputing the regularity of their acceptance and indorsement of the second part.<sup>6</sup>

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<sup>1</sup> Nouguiet des Lettres de Change, 1, 104.

<sup>2</sup> The facility which drawing a bill in sets affords for its presentment has been held to accelerate the time within which a bill, payable after sight, ought to be presented for acceptance. *Straker v. Graham*, 4 M. & W. 721.

<sup>3</sup> *Pinard v. Klockman*, 32 L. J. Q. B. 82; 3 Best & Smith, 388.

<sup>4</sup> See *Caras v. Thalmann*, 138 App. Div. (N. Y.) 297. — C.

<sup>5</sup> Byles on Bills (6th American edition), 578. A contract to deliver up a bill drawn in parts is a contract to deliver up every part. *Kearney v. West Granda Mining Company*, 1 H. & N. 412.

[See *Caras v. Thalmann*, 138 App. Div. (N. Y.) 297. — C.]

<sup>6</sup> *Holdsworth v. Hunter*, 10 B. & C. 449.

But as between *bona fide* holders for value of different parts of the same bill, he who first obtains a title to his part is entitled to the other parts,<sup>7</sup> and might, it has been said, maintain trover for them, even against a subsequent *bona fide* holder.<sup>8</sup>

If a man be under an obligation to deliver a foreign bill, it seems he is bound to deliver as many parts as may be applied for.<sup>9</sup>

An omission on one part to express the reference to the others, and the condition relating to them, may have the effect of obliging the drawer to pay more than one part.<sup>1</sup>

The drawer should accept only one part. For if two accepted parts should come into the hands of different holders, and the acceptor should pay one, it is possible that he may be obliged to pay the other part also.<sup>2</sup>

And he should not pay without taking back the part which he has accepted,<sup>3</sup> for, having paid the unaccepted part, he may be obliged afterwards to pay the accepted part also.

And if the indorser improperly circulate two parts to distinct holders, he may be liable on each.<sup>4</sup> The forgery of the payee's indorsement on one of the parts will of course pass no interest even to a *bona fide* holder.<sup>5</sup>

It is conceived that an indorser is not bound to pay any one part unless every part bearing his indorsements be delivered up to him.<sup>6</sup>

Copies of bills are not, it is believed, much used in this country. A protest may be made on the copy of a bill in some cases.<sup>7</sup> But abroad, when a bill is not drawn in sets, it is sometimes the practice to negotiate a copy, while the original is forwarded to a distance for acceptance.

In such a case the person who circulates the copy should transcribe the body of the bill, and all the indorsements, including his own, literally, and, after all, he should write "Copy:—the original being

<sup>7</sup> Ibid; *Perreira v. Jopp*, 10 B. & C. 450 n.

<sup>8</sup> For it is the duty of a person taking one of the several parts to inquire after the others. *Lang v. Smyth*, 7 Bing. 284, 294, 5 M. & P. 78; and he is advertised by the part which he does take that he takes it without the others at his peril.

<sup>9</sup> 1 Pard. 334. But since each part is now subject to a stamp, if issued or negotiated apart (33 & 34 Vict., c. 97, § 55), it may be doubtful whether he is so bound, unless the party applying will furnish the extra stamps.

<sup>1</sup> *Darison v. Robertson*, 3 Dow, 218, 228; Beawes, 430; Poth. 111; 2 Pard. 367. But not an inaccurate reference or an omission to name one part obviously by mistake. Bayley (6th ed.), 30.

<sup>2</sup> See *Holdsworth v. Hunter*, 10 B. & C. 449.

<sup>3</sup> Code de Commerce, art. 148.

<sup>4</sup> See *Holdsworth v. Hunter*, *supra*.

<sup>5</sup> *Chcap v. Harley*, 3 T. R. 127. See *Smith v. Mercer*, 6 Taunt. 80; 1 Marsh. 453, s. c.; *Fuller v. Smith*, 1 C. & P. 197; Ry. & M. 49, s. c.

<sup>6</sup> Cour de Cassation, 4 Avril, 1832; Sirey, t. 32, l. 29.

<sup>7</sup> *Dehers v. Harriot*, 1 Show. 163.

with such a person.” If he should omit to state that the bill is a copy, or to write his own indorsement *after* the word *copy*, he may become liable on the copy as on an original.<sup>8</sup>

It is a common but not a safe practice for a drawer, to whom a negotiated part has come back with many indorsements on it, to substitute a new part without such indorsements. The holder of such a substituted part may be deprived of his remedy against the acceptor by the intermediate act of the drawer.<sup>9</sup>

## § 310

WALSH *v.* BLATCHLEY.

6 WISCONSIN, 422. — 1853.

THE plaintiff declared in trespass on the case upon promises, for money lent; money laid out and expended; money paid and received by the defendants for the use of the plaintiff, etc; and gave notice of the cause of action, the indorsement by defendants upon the bill of exchange, copied, and served with the declaration as follows:

ADAMS &amp; Co.

Exchange for \$250.

No. 9,917.

EXPRESS EXCHANGE OFFICE,

DOWNIEVILLE, SAN FRANCISCO.

Oct. 6, 1854.

At sight of this second of exchange — first and third unpaid — pay to the order of Phoebe Blatchley, two hundred and fifty dollars value received, and place to account of exchange.

ADAMS &amp; Co.

To MESSRS. ADAMS &amp; Co., New York.

(Countersigned),

S. W. LANGWORTHY, C. B. MACY, *Agents*.

Indorsed by Phoebe Blatchley to Henry Dart or order, and by J. Henry Dart to P. O. Strang or order, and by Strang to P. Walsh or order.

The defendants plead the general issue; and by mutual agreement of counsel the cause was tried before the circuit judge, without the intervention of a jury, who found, and reported in writing with his decision, the facts and conclusions, and recited in full in the opinion of the court therein.

*By the Court*, COLE, J. — This case was tried by the court without the intervention of a jury, and the judge found the following facts:

First. That the action is brought upon the bill of exchange introduced in evidence, and described in the plaintiff's declaration. That this bill, which is the second of the set, was indorsed by the defendants on a Sunday.

Second. That the first of the set was sold by defendants to plaintiff about the 1st of January, 1855. That the plaintiff, without delay,

<sup>8</sup> Cour Royale de Paris, 14 Janvier, 1830; Sirey, t. 30, l. 172.

<sup>9</sup> *Ralli v. Dennistoun*, 6 Exch. 483.

sent the same by mail to his correspondent in New York city, the residence of the drawee, for presentation for payment. That by some delay in the mail the letter did not reach New York until the 9th of April following, at which time the letter, with inclosure, was duly received by the said correspondent. That the bill was not presented for payment.

Third. That in the last of March, the plaintiff, fearing the said first bill was lost, procured the defendants to indorse and deliver to him the second of the set, and had it presented on the third day of April following for payment, to the drawee, and payment was refused. The bill was duly protested, and proper notice given to the defendants, who were indorsers.

The conclusions of law which the court drew from these facts, were, "1st. That the liability in this action, if any at all, is upon the second bill of the set, and not on the first; 2d. That because the said bill was indorsed on Sunday, that therefore such indorsement was absolutely void."

We have examined with considerable care the authorities, and have not been able to find a case precisely like the present, although it would seem as if the point must frequently have arisen in the courts in this country, and in England. The case of *Perreira v. Jepp et al.* (cited in a note on page 449, 11 B. and C.), would seem to have a strong bearing upon the case at bar. It was there held that he to whom any part of the set is *first* transferred, acquires a property in *all* the other parts, and may maintain trover even against a *bona fide* holder, who subsequently, by transfer, or otherwise, gets possession of another part of the set. That is, deciding that the first indorsement of one of the set vests in the indorsee the absolute right to the possession of the whole set. And we suppose it would follow, from this doctrine, that the indorsement of the second in this case was entirely unnecessary. The liability of the indorser arose from indorsing the first of the set for value. We think her liability was not increased one jot or tittle by indorsing the second of the set. Suppose she had indorsed all of them in January, at the time she indorsed the first, is it not obvious that her liability would not have been different from what it is? It is conceded that the indorsement of the first was good, and this indorsement was entirely adequate to carry with it the second and third. (See Edwards on Bills, 304 and 162; *Holdsworth v. Hunter*, 10 B. C. 449; *Kenworthy v. Hopkins*, 1 Johns. Cas. 107.) Either of the set may be presented for acceptance, and, if not accepted, a right of action arises upon due notice against the indorser. (*Downes and Co. v. Church*, 13 Peters, 205.) The bill upon which the protest was made was declared on and produced, and it also appeared that the first had not been presented for payment. The court says, and we think properly and correctly, that

if the first had been presented for payment and protested, even as late as April 9th, that upon proper notice the indorser would have been held, for the delay in the mail would have been a sufficient excuse for the apparent neglect in not presenting it for acceptance before. The case might have been relieved from all doubt or difficulty, had the indorsee declared upon the first of the set, and produced on the trial the second, which had been presented for acceptance and dishonored. (*Wells v. Whitehead*, 15 Wend. 527.) This he did not see fit to do, but we think he was entitled to recover even as the facts appeared before the court.

The judgment is reversed, and a new trial ordered.<sup>1</sup>

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<sup>1</sup> It seems that an indorsee has no right to demand the other parts except from his immediate indorser. Thus, the fourth indorsee cannot maintain an action against the second indorser for outstanding parts of the set. *Pinard v. Klockmann*, 3 B. & S. 388; s. c., 32 L. J., Q. B. 82.

In an action against the acceptor on one part of the set, the holder need not file the other part or parts. *Johnson v. Offutt*, 4 Met. (Ky.) 19. In an action against the indorser on the second part, after dishonor by non-acceptance, the holder need not account for the first part; it is a matter of defence "to show either that some other bill of the set has been presented and accepted, or paid; or that it has been presented at an earlier time and dishonored, and due notice has not been given; or that another person is the proper holder, and has given notice of his title to the party sued; or that some other ground of defence exists, which displaces the *prima facie* title made out by the plaintiff." *Downes v. Church*, 13 Pet. (U. S.) 205; *Miller v. Palmer*, 58 Md. 452. But where the second of the set is protested for non-acceptance, the holder must produce that number of the set, because otherwise it may have been accepted *supra protest* for the honor of the defendant, and he be liable upon it. *Wells v. Whitehead*, 15 Wend. (N. Y.) 527. If the drawee accepts more than one part, he is liable on each to holders in due course. *Holdsworth v. Hunter*, 10 B. & C. 449; *Bank v. Neal*, 22 How. (U. S.) 96. If the drawee dishonors one part, but subsequently honors and pays the other part, the drawer is discharged. *Page v. Warner*, 4 Calif. 395.—H.



## ARTICLE XVII.

### PROMISSORY NOTES AND CHECKS.

#### I. Promissory notes.

##### 1. ORIGIN AND HISTORY.<sup>1</sup>

[See pages 27-28.]

##### 2. FORM AND INTERPRETATION.

See ARTICLE II, pp. 34-233, *ante*.

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<sup>1</sup> The statute of 3 & 4 Anne, c. 9, § 1 (1704), provided that, "Whereas it hath been held, that notes in writing, signed by the party who makes the same, whereby such party promises to pay unto any other person, or his order, any sum of money therein mentioned, are not assignable or indorsable over, within the custom of merchants, to any other person; and that such person to whom the sum of money mentioned in such note is payable cannot maintain an action, by the custom of merchants, against the person who first made and signed the same; and that any person to whom such note should be assigned, indorsed, or made payable, could not, within the said custom of merchants, maintain any action upon such note against the person who first drew and signed the same: Therefore, to the intent to encourage trade and commerce, which will be much advanced if such notes shall have the same effect as inland bills of exchange, and shall be negotiable in like manner, *be it enacted, etc.*, (1) That all notes in writing that, after [May 1st, 1705], shall be made and signed by any person . . . whereby such person . . . doth or shall promise to pay to any other person or persons, . . . his, her or their order, or unto bearer, any sum of money mentioned in such note, shall be taken and construed to be, by virtue thereof, due and payable to any such person or persons . . . to whom the same is made payable: (2) and also every such note payable to any person or persons, . . . his, her, or their order, shall be assignable or indorsable over in the same manner as inland bills of exchange are or may be, according to the custom of merchants; (3) and that the person or persons . . . to whom such sum of money is or shall be by such note made payable, shall and may maintain an action for the same, in such manner as he, she, or they might do upon any inland bill of exchange, made or drawn according to the custom of merchants, against the person or persons . . . who signed the same; (4) and that any person or persons . . . to whom such note . . . is indorsed or assigned, or the money therein mentioned ordered to be paid by indorsement thereon, shall and may maintain his, her, or their action for such sum of money, either against the person or persons . . . who . . . signed such note, or against any of the persons that indorsed the same, in like manner as in cases of inland bills of exchange."

The statute was held to apply to foreign, as well as domestic, notes. *Milne v. Graham*, 1 Barn. & Cress. 192. Statutes of like tenor have been passed in the American states. 1 Daniel, § 5. Independent of statute, some courts have held promissory notes to be negotiable by force of common law. *Dunn v. Adams*, 1 Ala. 527; *Irvin v. Maury*, 1 Mo. 194. See 1 Parsons, Bills and Notes (2d ed.), pp. 9-13; Story on Prom. Notes, § 6. — H.

## § 320

EDELMAN *v.* RAMS.

58 MISCELLANEOUS (N. Y. SUP. CT., APP. T.) 561. — 1908.

DEMURRER to complaint on promissory note overruled and defendant appeals.

GILDERSLEEVE, P. J. \* \* \* The appeal from the interlocutory judgment rendered on January 3, 1908, is well founded, and that judgment must be reversed. The plaintiff's cause of action rests upon a promissory note made by the defendant and payable to the "order of myself." Although the complaint alleged the making and delivery for value of the note to the plaintiff, and that the plaintiff was the lawful holder and owner of the note, and its presentation and demand for and refusal of payment, it contained no allegation that said note was ever indorsed by the defendant, its maker. The Negotiable Instruments Law of the state (Laws 1897, p. 755, c. 612) repealed all prior statutes regarding bills and notes, and provides by section 320 thereof as follows:

"A negotiable promissory note within the meaning of this act is an unconditional promise in writing made by one person to another signed by the maker engaging to pay on demand or at a fixed or determinable future time, a sum certain in money to order or to bearer. Where a note is drawn to the maker's own order, it is not complete until indorsed by him."

The note, unless indorsed by the defendant, was therefore incomplete, and the failure of the complaint to allege such indorsement rendered it demurrable. *Odell v. Clyde*, 53 N. Y. Supp. 61, 62.

Interlocutory judgment of January 3, 1908, reversed, and demurrer sustained, with costs, with leave to the plaintiff to amend the complaint within five days upon payment of said costs. Costs of one party to be offset against those allowed the other. All concur.

## 3. NON-NEGOTIABLE NOTES.

## § 320

SMITH *v.* KENDALL, EXECUTOR.

6 TERM REPORTS, 123. — 1794.

ASSUMPSIT on the following instrument, given by defendant's testator: —

Three months after date I promise to pay to Mr. Smith, currier, 40*l*, value received in trust for Mrs. E. Thompson, as witness my hand.

L. ASKEW.

25 June, 1787.

The action was commenced September 26, 1793. Defendant objected that the instrument was not a promissory note within the

statute (3 and 4 Anne, c. 9), and, if not, the cause of action accrued Sept. 25, 1787, three months after the date of the note, and consequently that six years had elapsed before the suing out of the writ, and that the cause of action was barred by the statute of limitations.

Verdict for defendant, with leave to plaintiff to move to set that verdict aside, and to enter a verdict for him, if this court thought he was entitled to recover. Motion accordingly.

LORD KENYON, C. J., said, If this were *res integra*, and there were no decisions upon the subject, there would be a great deal of weight in the defendant's objection; but it was decided in a case in Lord Raymond (2 Lord Raym. 1545), on demurrer, that a note payable to B., without adding or to his order, or to bearer, was a legal note within the act of Parliament. It is also said in Marius that a note may be made payable either to A. or bearer, A. or order, or to A. only. In addition to these authorities I have made inquiries among different merchants respecting the practice in allowing the three days' grace, the result of which is that the Bank of England and the merchants in London allow the three days' grace on notes like the present. The opinion of merchants indeed would not govern this court in a question at law, but I am glad to find that the practice of the commercial world coincides with the decision of a court of law. Therefore, I think that it would be dangerous now to shake that practice, which is warranted by a solemn decision of this court, by any speculative reasoning upon the subject; and consequently this rule must be made absolute to enter a verdict for the plaintiff.

Rule absolute.<sup>2</sup>

## § 320

## CARNWRIGHT v. GRAY, EXECUTOR.

127 NEW YORK, 92. — 1891.

ACTION on the following instrument, executed by defendant's testator: —

QUARRYVILLE, September 2, 1871.

Thirty days after death, I promise to pay to Cornelius Carnwright fifteen hundred dollars, with interest,

SAMUEL P. FRELIGH.

Plaintiff gave no evidence of consideration, but proved the genuineness of the signature, put the note in evidence, and rested his case.

Judgment for plaintiff. Defendant appeals.

BROWN, J. — When the plaintiff rested his case and again at the close of the testimony the defendant moved to dismiss the complaint

<sup>2</sup> Grace is allowed on non-negotiable notes. *Duncan v. Maryland Savings Inst.*, 10 Gill & J. (Md.) 299; *Dubuys v. Farmer*, 22 La. Ann. 478; *Cox v. Reinhardt*, 41 Tex. 591. Contra: *Luce v. Shoff*, 70 Ind. 152. The matter is now unimportant where days of grace are abolished. Neg. Inst. L., § 145. — H.

upon the ground that no proof had been given that the instrument sued upon had any consideration. These motions were denied and the court instructed the jury that the instrument was a promissory note and imported a consideration, and that the burden rested upon the defendant to show that it was without a consideration.

The exceptions to these rulings present the principal question argued upon this appeal.

The statute of this state in reference to promissory notes provides as follows (1 R. S. 768):

§ 1. All notes in writing, made and signed by any person, whereby he shall promise to pay to any other person or his order, or to the order of any other person, or unto the bearer, any sum of money therein mentioned, shall be due and payable as therein expressed; and shall have the same effect and be negotiable in like manner as inland bills of exchange, according to the custom of merchants.

§ 4. The payees and indorsees of every such note payable to them or their order and the holders of every such note payable to bearer, may maintain actions for the sums of money therein mentioned, against the makers and indorsers of the same respectively, in like manner as in cases of inland bills of exchange, and not otherwise.<sup>3</sup>

Our statute is a substantial reenactment of the statute of Anne (3 and 4 Anne, c. 9), which provided that: "All notes signed by a person promising to pay to another his, her, or their order or to bearer" should be construed to be by virtue thereof due and payable to any such person to whom the same is made payable, etc., etc.

This statute was held by the courts of England to include within its terms a non-negotiable note. (*Smith v. Kendall*, 6 D. & E. 123; *Burchell v. Sloccock*, 2 Ld. Raym. 1545; 3 Kent's Com. 77.) In the case first cited Lord Kenyon said: "A note may be made payable to 'A.' or bearer, 'A.' or order, or to 'A.' only." Similar decisions were made by the courts of this state under our own statute. (*Downing v. Backenstoës*, 3 Caine, 137; *President v. Hurtin*, 9 Johns. 217; *Kimball v. Huntington*, 10 Wend. 675; *Hall v. Farmer*, 5 Denio, 484.)

In *Downing v. Backenstoës* a non-negotiable note was declared on as within the statute and the defendant demurred on the ground that the declaration did not allege the transaction and consideration upon which the note was given. The court gave judgment for the plaintiff, saying: "The very point was settled in *Green v. Long* (April Term, 1798), in conformity to the adjudications in Westminster Hall."

In *President v. Hurtin* it was said: "The note set forth is a good promissory note within the statute, though it has no words bearer or

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<sup>3</sup> This statute is now repealed by N. Y. Neg. Inst. L., § 340, and is replaced by § 320. — H.

order. This is the established English law, and the same rule is recognized by this court."

In *Kimball v. Huntington* the action was upon a due bill in this form: "Due Kimball & Kenston three hundred and twenty-five dollars payable on demand." Judge Nelson said: "The instrument is a promissory note within the statute. Neither the acknowledgment of value received or negotiable words are essential to bring it within the statute." (See also *Carver v. Hayes*, 47 Me. 257; *Franklin v. March*, 6 N. H. 364.)

No authority is cited in the courts of this state or of England holding that a non-negotiable note is not within the terms of the laws cited, and we are of the opinion that the language of our statute includes a note payable to a person without words of negotiability.

The instrument sued upon being, therefore, a promissory note within the statute of this state, it follows that it imports a consideration. By the express terms of the statute the sum of money therein mentioned is declared to be "due and payable as therein expressed." That it is "due and payable" according to its terms is the legal conclusion which the court must draw from the instrument itself. A valid contract is thus declared to exist, and of course a consideration must be implied. Hence "value received" need not appear on the face of the note, as those words express only what the law implies. (*Hatch v. Traves*, 11 Ad. & El. 702; *Hall v. Farmer*, 5 Denio, 484.)

The effect of laws which make promissory notes negotiable, or which authorize actions of debt upon them, though non-negotiable, is to take them out of the common-law rule which requires that every contract must be shown by the party who sues upon it, to be supported by a consideration, and enables the holder to maintain an action thereon without alleging or proving a consideration. In other words, a consideration is implied from the character of the instrument. (*Peasley v. Boatwright*, 2 Leigh, 195; *Hatch v. Traves*, *supra*.)

The English statute was enacted to settle the controversy that prevailed, whether under the customs of merchants promissory notes were negotiable. They were thereby declared to be assignable or indorsable over in the same manner as inland bills of exchange were according to the customs of merchants, and holders were empowered to maintain actions thereon in the same manner as they might do upon any inland bill of exchange made or drawn according to the custom of merchants.

Our statute contains similar provisions. Promissory notes and inland bills of exchange were, by virtue of these laws, put upon an equality. They were made negotiable if they contained words of negotiability, but whether negotiable or not, and whether they expressed value received or not, it was no longer necessary in actions thereon to aver and prove consideration.

Such was and is the rule as to inland bills of exchange. (1 Daniel

on Negotiable Inst., § 161; *Raubitschek v. Blank*, 80 N. Y. 479; *Averett's Adm'rs v. Booker*, 15 Gratt. 163; *Wells v. Brigham*, 6 Cush. 6.)

And the same rule under the statute was made applicable to promissory notes. (*Townsend v. Derby*, 3 Metcalf, 363; *Dean v. Carruth*, 108 Mass. 242; *Bank of Troy v. Topping*, 9 Wend. 277; 13 Id. 557; Chitty on Bills [9th Am. ed.], 78-181; *Paine v. Nalke*, 57 How. Pr. 273; Story on Promissory Notes, § 51; 3 Kent's Com. 77, 78; 1 Parsons on Conts. [6th ed.], 249; 1 Parsons on Bills, 193.)

The statute does not require a note to express value received upon its face, and no definition of such an instrument requires the expression of that fact.

The note sued upon, although by its terms payable after the death of the maker, was a valid instrument.

A promissory note is defined to be a written engagement by one person to pay absolutely and unconditionally to another person therein named, or to the bearer, a certain sum of money at a specified time or on demand. (Story on Prom. Notes., § 1; *Coolidge v. Ruggles*, 15 Mass. 387.) It must contain the positive engagement of the maker to pay at a certain definite time and the agreement to pay must not depend on any contingency, but be absolute and at all events. Tried by this standard the instrument set out in the complaint was a valid promissory note. The fact that it was payable after the death of the maker did not affect its character. (3 Kent's Com. 76.)

It follows from these views that the motion to dismiss the complaint was properly denied, and there was no error in the charge of the court.

The point made by the appellant that the court erred in its charge as to the burden of proof on the question of consideration, assuming that evidence *pro* and *con* upon the question was given, was not raised at the trial. The proposition made by the defendant at the close of the judge's charge, and the only one to which an exception appears in the record, was as follows: "In order that there may be no doubt about our position we ask the court to charge the jury that there has been no evidence given of consideration, and to direct a verdict for the defendant upon that ground." The defendant having thus squarely planted himself on the ground that there was no evidence of consideration, and asked the court to direct a verdict in his favor, cannot now claim that there was evidence for the jury and that he was entitled to a different instruction from that given.

The defendant's claim all through the trial was that the note did not import a consideration, and that the plaintiff could not recover without proof of that fact, and his motion to dismiss the complaint and to direct a verdict in his favor, and his exceptions to the charge, all sharply present that question; but he nowhere claimed that he

had given evidence which, if believed by the jury, overcame the presumption arising in favor of the note. This clearly appears from the statement I have quoted.

The exceptions to the admission of evidence present no error, and the judgment should be affirmed.

All concur, except FOLLETT, CH. J., and VANN, J., dissenting, and PARKER, J., not voting.

Judgment affirmed.<sup>4</sup>

## § 320

## CROMWELL v. HEWITT.

40 NEW YORK, 491. — 1869.

ACTION against payee-indorser of two instruments as follows:—

New York, March 22d, 1861.

\$75.

Sixty days after date I promise to pay to Richard Hewitt seventy-five dollars, value received.

WILLIAM RYAN.

[Indorsed]:

JAMES R. HEWITT,

RICHARD HEWITT.

Another of like tenor for four months was made and indorsed as above.

\* Accord: *Hegeman v. Moon*, 131 N. Y. 462. Contra: *Bristol v. Warner*, 19 Conn. 7, ante, p. 234; *Currier v. Lockwood*, 40 Conn. 349, ante, p. 42. The question as to whether a non-negotiable promissory note imports a consideration must turn upon a construction of the statute governing promissory notes. Apparently the Neg. Inst. L., § 320, has changed the law in New York, as the section referred to includes only negotiable promissory notes.—H.

[In *Deyo v. Thompson*, 53 App. Div. (N. Y.) 9, it was held that under the provisions of the Negotiable Instruments Law a note in the following form, "On demand I promise to pay Helen Deyo three hundred dollars," does not import a consideration, and the burden is upon a party suing on such note to prove the existence of a consideration therefor by extrinsic evidence. Merwin, J., said: "The note was not negotiable and did not express consideration. In *Carnwright v. Gray* (127 N. Y. 92) it was held, of such a note, that it imported a consideration and that the burden of showing a want thereof was upon the defendant. This decision was based on the provisions of the Revised Statutes (Part 2, chap. 4, tit. 2, 1 R. S. 768) on the subject of promissory notes. These provisions were repealed by the Negotiable Instruments Law (Chap. 612, Laws of 1897), and I find no provision in that law that will allow us to hold that a note, like the present one, imports a consideration. In the *Carnwright* case it was evidently considered that, in the absence of a statutory provision, there was no presumption of consideration and that the burden of proving it was upon the party who brought the action. And that seems to be the rule. (1 Daniel Neg. Inst., 4th ed. § 162)." P. 12. This point does not seem to have been passed upon as yet by the New York Court of Appeals.—C.]

James Hewitt was originally made a defendant, but the action as to him was discontinued, and this action is against Richard Hewitt, the payee-indorser.

The plaintiff testified that the defendant was owing the plaintiff, and that it was understood between them that when these notes were passed over by him in payment, that they were taken solely upon his responsibility, and that he assured plaintiff that they should be paid.

The action was to charge defendant as guarantor. No presentation to the maker for payment or notice of non-payment to Hewitt was shown. The court below held the suit could not be maintained, and dismissed the complaint. Plaintiff appeals.

MASON, J. — This action was brought to recover of the defendant the amount of two non-negotiable notes of seventy-five dollars each, upon the following facts: One William Ryan made the notes payable to defendant by name, and the defendant transferred the notes to the plaintiff for value, and indorsed them over by writing his name upon the back. The notes were not presented for payment when they fell due, nor was any notice of non-payment given to the defendant, and the only question in the case is whether the plaintiffs are entitled upon these facts to recover of the defendant the amount of the notes. The case of *Richards' Ex'r v. Warring*<sup>5</sup> (1 Keyes R. 575), is an authority in point, and decides the very question in favor of the plaintiff. The case holds that the holder may overwrite the indorser's name with a contract of guaranty, or as maker of the note. That case must be regarded as controlling, even should we think the reasons assigned for the decision unsatisfactory.

The judgment of the Supreme Court must be reversed and a new trial granted, with costs, to abide the event.<sup>6</sup>

<sup>5</sup> This was a case of "irregular indorsement." — H.

<sup>6</sup> Accord: *Sweetser v. French*, 13 Met. (Mass.) 262; *Prentiss v. Danielson*, 5 Conn. 175; *Castle v. Candee*, 16 Conn. 223; *Ford v. Mitchell*, 15 Wis. 304.

A payee-indorser in blank of a non-negotiable note becomes liable, not as indorser, but if at all as guarantor. In some states no presumption arises that any liability is undertaken, the indorsement being treated simply as a transfer or assignment of a common-law contract. *Shaffstall v. McDaniel*, 152 Pa. St. 508; *Story v. Lamb*, 52 Mich. 525. But evidence of the true contract is admissible. (*Ibid.*) An indorsement of a non-negotiable note "waiving protest" is an indication of an intention to assume the liability of guarantor. *First N. B. v. Falkenhan*, 94 Calif. 141.

The indorser becomes liable only to his immediate indorsee, and not to a remote indorsee. *Kendall v. Parker*, 103 Calif. 319. Contra: *Wareham Bank v. Lincoln*, 3 Allen (Mass.), 192 (*semble*).

An irregular indorser of a non-negotiable note is a guarantor. *Richards' Ex'r v. Warring*, 1 Keyes (N. Y.), 576; *McMullen v. Rafferty*, 89 N. Y. 456; *First N. B. v. Babcock*, 94 Calif. 96; *Orrick v. Colston*, 7 Gratt. (Va.) 189. See on non-negotiable notes, Story on Prom. Notes, §§ 128-129; 2 Randolph on Comm. Paper, §§ 655-661. — H.



## II. Checks.

## 1. CHECK DISTINGUISHED FROM BILL OF EXCHANGE.

## § 321 HARRISON v. NICOLET NAT. BANK.

41 MINNESOTA, 488. — 1889.

APPEAL by plaintiff from an order of the District Court for Hennepin county, Rea, J., presiding, sustaining a demurrer to the complaint. The action was to recover \$20,000 damages for that the defendant, on April 14, 1888, and before the maturity thereof, did "falsely, wrongfully, and maliciously" cause to be protested the following instrument, which had been indorsed and forwarded to defendant for collection, thereby injuring plaintiff's credit, etc.:

45 Washington Ave., South,  
HARRISON, the TAILOR.

\$199.92.

MINNEAPOLIS, Minn., *Mch.* 27, 1888.

On April 14th pay to the order of E. Harrison one hundred and ninety-nine 92-100 dollars.

J. T. HARRISON.

TO CITIZENS' BANK.  
Minneapolis, Minn.  
No. 2,884.

MITCHELL, J. — This appeal presents the question whether a written order on a bank or banker to pay a sum of money at a day subsequent to its date, and subsequent to the date of its issue, is a "check," or a "bill of exchange," and hence entitled to grace. The question is one which has given rise to considerable discussion and some conflict of opinion.

About all the law there is on it, as well as all the arguments on each side, will be found in Morse, Bank (3d ed.), § 381 *et seq.* The two principal authorities holding such an instrument a check are *In re Brown* (2 Story, 502), and *Champion v. Gordon* (70 Pa. St. 474). Both of these are entitled to great weight, but they stand almost alone; the supreme courts of Rhode Island (*Westminster Bank v. Wheaton*, 4 R. I. 30), and perhaps of Tennessee, being, so far as we know, the only ones which have adopted the same views.<sup>7</sup> All other courts which have passed upon the question, as well as the text-writers, have almost uniformly laid it down that such an instrument is a bill of exchange, and that an essential characteristic of a check is that it is payable on demand. This was finally settled, after some conflict of opinion, in New York,—the leading commercial state of the Union,—in the case of *Bowen v. Newell*, several times before the courts, 5 Sandf. 326; 2 Duer, 584; 8 N. Y. 190, and 13 N. Y. 290, 64 Am. Dec. 550. (See, also, *Morrison v. Bailey*, 5 Ohio St. 13, 64

<sup>7</sup> See also *Way v. Towle*, 155 Mass. 374. — H.

Am. Dec. 632; *Woodruff v. Merchants' Bank*, 25 Wend. 673; *Minturn v. Fischer*, 4 Cal. 35; *Bradley v. Delaplaine*, 5 Har. [Del.] 305; *Georgia National Bank v. Henderson*, 46 Ga. 487; *Ivory v. Bank of State of Mo.*, 36 Mo. 475, 88 Am. Dec. 150; *Work v. Tatman*, 2 Houst. 304; *Hawley v. Jette*, 10 Or. 31; 2 Daniel Neg. Inst., §§ 1573-1575; *Morse, Bank., supra.*)

Nearly every definition of a check given in the books is to the effect not only that it must be drawn on a bank or banker, but that it must be payable on demand. (1 Rand. Com. Paper, § 8; Byles, Bills, 13; 2 Daniel, Neg. Inst., § 1566; 1 Edw. Bills, § 19; Bigelow, Bills and N., 116; Chalm. Dig. Bills and N., art. 254; Shaw, Ch. J., in *Bullard v. Randall*, 1 Gray, 605; Bouv. Law. Dict.; Burrill, Law Dict.) Occasionally the expression is used "payable on presentation," but evidently — except perhaps in Story on Bills — as synonymous with "payable on demand."

As the question is a new one in this state, we would not feel compelled to follow the majority if the better reasons were with the minority. Perhaps the weightiest argument in favor of holding such an instrument a check is the practical one advanced by Sharswood, J., in *Champion v. Gordon, supra*, viz., that if held to be a bill of exchange the holder might immediately present it for acceptance, and if not accepted he could sue the drawer, or if accepted it would tie up the drawer's funds in the hands of the bank, and thus, in either case, frustrate the very object of making it payable at a future day. In answer to this, it may be said that the drawer, if he wished, could very easily avoid such consequences by inserting appropriate provisions in the instrument. On the other hand, if we hold that an instrument not payable on demand may be a check, we are left without any definite or precise rule by which to determine when the paper is a check, and when a bill of exchange. The fact that it is drawn on a bank is not alone enough to distinguish a check from a bill of exchange, for nothing is better settled than that a bill of exchange may be drawn on a banker. Neither will the fact that the maker writes it on a "blank check" be any test, for the kind of paper it is written on cannot control the import and legal effect of its words. Neither can the question whether it is drawn against a previous deposit of funds by the drawer with the drawee furnish any criterion, for nothing is clearer than that a bill of exchange, as well as a check, can be drawn against such a deposit, and that an instrument may be a check although the drawer has no funds in the hands of the drawee. Neither will it do to say that if it is entitled to grace it is a bill, but if not entitled to grace it is a check, because the legal character of the instrument has first to be determined before it can be known whether or not it is entitled to grace. In short, if we omit from the definition of a check the element of its being payable on demand, bankers and business men are left without any definite rule by

which to govern their action in a matter where simplicity and precision of rule are especially desirable. It might be expedient to enact, as has been done in New York and some other states, that all checks, bills of exchange, or drafts, appearing on their face to be drawn on a bank or banker, whether payable on a specified day or any number of days after date or sight, shall be payable on the day named in the instrument without grace; or, what might be better still, to abolish days of grace altogether as a usage which has already long outlived the condition of things out of which it had its origin. But this is a matter for legislatures and not for courts. We are therefore of opinion that the better rule is to hold that such an instrument is a bill of exchange, and hence entitled to grace. We may add that it is always desirable that the decisions of the courts should be in accord with the business usages and customs of the country. Such usages are entitled to special weight on a question like this, for the whole matter of grace on bills and notes had its origin in the usage of bankers. And, so far as we are advised, the general practice of bankers in this state has been to treat instruments like this as bills of exchange and not checks.

Counsel for respondent suggests that, even if we hold that payment of this paper was demanded and protest made prematurely, yet the action of the court below in sustaining the demurrer to the complaint should be affirmed on other grounds, viz., that the act of protesting, etc., was the act of the notary and not of the bank; that the protest could not have damaged the financial standing of the plaintiff because the certificate of the notary shows on its face that it was done before maturity; also, that the instrument, being of doubtful classification, involving a legal question on which courts differed, the defendant would not be liable for an honest mistake of law. Whatever force there might be in these suggestions, either by way of defense or in mitigation, we think they are unavailing in support of a demurrer to a complaint which alleges that the defendant "falsely, wrongfully and maliciously caused" the paper to be protested for non-payment, and notices of protest sent out, and which also shows that such notices — which were presumably what, if anything, injured plaintiff's standing and credit — contained nothing indicating that payment was prematurely demanded.

Order reversed.<sup>8</sup>

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<sup>8</sup> A post-dated check is to be distinguished (outside of Mass., Pa., and R. I.), from a check payable by its terms after the date of issue. 2 Daniels, §§ 1577-1578; *Crawford v. West Side Bank*, 100 N. Y. 56. A post-dated check is to be treated as if issued on the day of its date. *Frazier v. Trow's, Printing, Etc., Co.*, 24 Hun, 281, 90 N. Y. 678. — H.

## 2. PRESENTMENT OF CHECK.

(a) *Effect of delay upon drawer's liability.*

§ 322

GRANGE v. REIGH.

93 WISCONSIN, 552. — 1896.

ACTION against the drawers of a check. Defendants, after banking hours on July 20, drew and delivered to plaintiff in Milwaukee, where plaintiff resided, a check for \$1,211 upon the South Side Savings Bank, located in Milwaukee. The check was not presented on July 21, during all of which day the bank was open and would have paid the check had it been presented. The bank did not open after July 21, by reason of which the check was not paid. Judgment for defendants.

MARSHALL, J. — The settled law applicable to the facts of the case is that, if a person receives a check on a bank, he must present it for payment within a reasonable time, in order to preserve his right of recourse on the drawer in case of non-payment by the drawee;<sup>9</sup> and that, when such person resides and receives the check at the same place where such bank is located, a reasonable time for such presentation reaches, at the latest, only to the close of banking hours on the succeeding day, excluding Sundays and holidays. (Tiedeman, Com. Paper, § 443; 2 Daniel, Neg. Inst., §§ 1590, 1591, and cases cited; *Lloyd v. Osborne*, 92 Wis. 93.) Plaintiff failed to comply with the law in this respect; hence defendants were discharged from all liability to answer for the default of the bank. Such was the decision of the trial court, and it must be affirmed.

By the Court. — Judgment affirmed.<sup>1</sup>

<sup>9</sup> It was held in *Lewis, Hubbard & Co. v. Montgomery Supply Co.*, 59 Va. 75, that failure to present a check does not bar recovery from the drawer, if the time intervening between delivery thereof and the failure of the bank, is not sufficient for presentment by the exercise of such diligence as the law requires, citing *Cox v. Boone*, 8 W. Va. 500. — C.

<sup>1</sup> But delay which occasions no loss to the drawer will not discharge the drawer; in this respect a check differs materially from a bill of exchange. *Syracuse, etc., R. R. v. Collins*, 57 N. Y. 641; *Woodin v. Frazee*, 38 N. Y. Super. Ct. 190; *Cogswell v. Savings Bank*, 59 N. H. 43; *Bull v. Bank*, 123 U. S. 105; 2 Morse on Banks, § 421; 2 Daniel on Neg. Inst., § 1587.

A banker's draft, that is a check or draft by one bank upon another, need not be presented with the same promptitude as the check of an individual; it is intended to circulate for a limited period. *Bull v. Bank*, 123 U. S. 105; 2 Daniel, § 1595a.

The rule of diligence as to notice of dishonor and the rules as to excuses for delay, etc., are the same as in the case of bills and notes. 2 Daniel, §§ 1596-1598; 2 Morse, § 428.

An indorser of a check is entitled to due presentment and notice, and the

## § 322

## MOSKOWITZ v. DEUTSCH.

46 MISCELLANEOUS (N. Y. SUP. CT., APP. T.) 603. — 1905.

JUDGMENT for plaintiff and defendants appeal.

O'GORMAN, J. — The defendants made a check to one Goldberg under date of September 2d. On the following day the payee represented to the defendants that he had lost this check, whereupon payment thereof was stopped at the bank, and five or six days later he received from the defendants another check for the same amount, which was duly cashed. A day or two after September 12th, the original check of September 2d with a "1" inserted before the "2," making the date September "12," was indorsed over to the plaintiff by Goldberg, and cashed. The plaintiff now sues the drawers, and the defense is a general denial and forgery. That the date of this check has been altered by Goldberg, or at his instance, is too clear for dispute. Such an alteration is material, constitutes forgery, and destroys the validity of the check, except as provided by section 205 of the Negotiable Instruments Law (Laws 1897, p. 745, c. 612), which declares that, "when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor." If it be assumed, therefore, as the court below has found, that the plaintiff is an innocent holder for value in due course, he may assert such rights as are conferred by the check as it was before the alteration. We then have a case where a check dated September 2d is cashed by the plaintiff and presented for payment more than 10 days thereafter. As all the parties resided, and the bank was situated in the city of New York, the delay in the presentment of the check was unreasonable, and was sufficient to discharge the defendants as drawers from liability thereon to the extent of the loss, if any, incurred by them in consequence of the delay. But the only way in which a drawer of a check can be exposed to injury by such delay is where the bank becomes insolvent subsequent to the delivery of the check and prior to its presentment. *Eaton & Gilbert on Commercial Paper*, 630, and cases cited; *Andrus v. Bradley* (C. C.) 102 Fed. 54, affirmed 107 Fed. 196. The loss suffered by the defendants must be attributed not to delay in the presentment of the check, but to their imprudent reliance on the false and fraudulent representations of the payee. Before giving the new check,

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question as to whether he is injured by the delay seems immaterial. *Murray v. Judah*, 6 Cow. (N. Y.) 484; *Mohawk Bank v. Broderick*, 10 Wend. (N. Y.) 304; *Kirkpatrick v. Puryear*, 93 Tenn. 409; 2 Morse on Banks, § 422. The same rules of diligence apply as in the case of the drawer. *Gifford v. Hardell*, 88 Wis. 538; *Smith v. Janes*, 20 Wend. (N. Y.) 192; *Carroll v. Sweet*, 128 N. Y. 19. — H. [See cases, *post*, pages 734-743. — C.]

the defendants might have insisted upon full indemnity from Goldberg, and thus escaped the loss of which they now complain. By their conduct, Goldberg found it possible to perpetrate a fraud, and the consequences of their misplaced confidence in him should be borne by them, and not visited upon the plaintiff, an innocent party to the transaction. Upon the facts, the plaintiff was entitled to judgment.

Judgment affirmed, with costs.

All concur.

§ 322

GREGG *v.* BEANE.

69 VERMONT, 22. — 1895.

GENERAL assumpsit by the firm of Gregg & Co., against J. H. Beane. Defendant pleaded the general issue, payment, and notice of special matter. There was a trial by the court. Plaintiffs had judgment, and defendant excepts.

MUNSON, J. — The plaintiffs claim to recover the amount of a check drawn in their favor by the defendant on S. M. Dorr's Sons, private bankers at Bristol, Vt., and mailed them in payment of an indebtedness. The check was received by the plaintiffs at their place of business in Trumansburg, N. Y., on the 9th of August, and was forwarded on the same day to the First National Bank of Ithaca, N. Y., for collection. On the 10th of August the bank at Ithaca mailed the check for collection to its reserve agent, the Fourth National Bank of New York city. This bank received it on the 11th of August, and on the 12th mailed it for collection to the Merchants' National Bank of Burlington, one of the banks through which it made its collections in Vermont. The 13th was Sunday. The Burlington bank received the check on the morning of the 14th, at an hour which did not permit of its being sent to Bristol by the morning mail of that day. The banking house of S. M. Dorr's Sons closed its doors on the 14th, at 10 o'clock in the forenoon.

It is found that 24 hours is required for the transmission of mail between Trumansburg and Bristol; and, in the absence of any statement as to the hours of departure and arrival, it must be assumed from this general finding that a letter mailed in Trumansburg to a correspondent in Bristol would be received on the following day. There is no special finding in regard to mails from Ithaca, but it is evident from its location and connections that it is within the facts found in regard to Trumansburg. It appears then that, if the Ithaca bank had mailed the check directly to some one in Bristol, it would have been received on the 11th, and would have been presented by the 12th, and paid. No claim inconsistent with this view is made in argument.

It is found that, in collecting a check in the usual way, the payee deposits it in a local bank, and that the local bank sends it to its reserve bank in Boston, New York, Albany, or Troy, and that the reserve bank sends it to its correspondent bank nearest the bank on which the check is drawn, and that the correspondent bank sends it to the drawee. It is found, however, that in some cases a reserve bank receiving a check for collection sends it directly to the bank on which it is drawn; but it is also found that, if this course had been pursued in the present instance, the check would not have reached Bristol in due course of mail until after the suspension. It is further found that, in collecting this check, the plaintiffs pursued the usual and ordinary course, and that there was not in that course any unusual or unnecessary delay.

The plaintiffs claim that the finding of the court below that this check was forwarded for collection in the usual way is conclusive upon the question of diligence. But this cannot be so, unless it be considered that any change of method which grows into a settled practice of itself works a modification of the law. It can hardly be claimed that custom is so exclusively the test of diligence that the adoption of a particular practice by any class of business men leaves nothing for the determination of the court. When the custom of one period has resulted in the adoption of a definite legal rule, the development of a new custom will not effect a modification of the rule in advance of judicial sanction.<sup>2</sup> The case shows the manner in which this check was forwarded for presentment, and, when the facts are found, due diligence is a question of law.

The rule, in its most general statement, requires the payee of a check to present it for payment with reasonable diligence. But the law goes further than this general statement, and determines what reasonable diligence is under ordinary circumstances. When the case presents only the simple facts of time, location, and stated means of communication, the question of liability is to be determined by an application of the more definite rule. It is only when the case presents special circumstances which are claimed to warrant further delay that the court is left without other guidance than the general requirement. This case discloses nothing in the nature of an excuse for delay.

It is well settled that a check must be presented to the bank on which it is drawn if the bank be in the same place with the holder, or forwarded by mail if the bank be in another place, by the next secular day after it is received, and that the depositing of the check in a local bank for collection does not give the holder the benefit of an additional day. So this check was forwarded neither earlier nor

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<sup>2</sup> But see *Plover Savings Bank v. Moodie*, 135 Iowa, 685, *post*, p. 735. — C.

later than the law required; and the controversy is confined to the question whether it was forwarded in the proper manner.

As presented by the findings, the question is whether the local bank was justified in forwarding the check through its New York correspondent. The defendant sustained no harm from the course taken by the New York bank in sending it to Burlington. It is said in *Daniel on Negotiable Instruments* (§ 1592) that, when the payee receives a check from the drawer in a place distant from the place where the bank on which it is drawn is located, it will be sufficient if he forward it by post to some person in the latter place on the next secular day after it is received, and if the person to whom it is thus forwarded present it for payment on the day after it has reached him by due course of mail. If this be accepted as a correct statement of the rule, it would seem not to permit the collection through a correspondent so remote as to delay the presentment a day beyond the time so allowed. It is true that the rule is sometimes stated to be that the check should be forwarded for presentation on the day after it is received, and that the agent to whom it is forwarded must in like manner present it, or forward it, on the day after he receives it. This phraseology might seem to contemplate the collection of a check by means of several agents. But statements regarding the forwarding of a check by successive holders will ordinarily be found to refer to checks drawn for the purpose of being put in circulation, or to questions arising between indorser and indorsee where a check given in payment has been diverted from its proper use. Statements applicable to such cases must not be taken to indicate that the requirement of diligence, as between payee and drawer, will be satisfied by a regular transmission upon successive days, if an improper number of agents be employed.

The rule is ordinarily stated to be that the payee or the local bank receiving it for collection must forward it directly to the place of payment. It is said in *Byles on Bills* that the bank receiving it for collection cannot postpone the time of presentment by circulating it through agents or branches of the bank. In *Moule v. Brown* (4 Bing. N. C. 266), the right of a branch office of the plaintiff bank to send through the home office, in accordance with the custom of the bank, was considered and denied.

We do not find that any modification of the rule as before stated has been recognized in recent cases. In *Bank v. Miller* (37 Neb. 500),<sup>3</sup> the question was as to the liability of the payee on his indorsement to the bank. The check was deposited on Saturday, the 31st day of May, and was drawn on a bank located at Courtland, 27 miles distant from the bank of deposit, and accessible by two daily mails.

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<sup>3</sup> Affirmed on rehearing, 43 Neb. 791. — H.



On receiving the check, the Bank of Wymore mailed it to a bank in St. Joseph, Mo., for collection, and this bank mailed it to a bank in Omaha for collection, and the latter bank mailed it to the bank on which it was drawn. The court said the evidence did not show that this method of presentment was in accordance with any custom of bankers, but said, further, that, if such a custom had been shown, it would not have relieved the bank from liability. Without undertaking to lay down any general rule, the court said that, in this case, Tuesday, June 3d, would have been a reasonable time within which to make presentment. This was in accordance with the rule as stated by Daniel<sup>1</sup>.

In *Gifford v. Hardell* (88 Wis. 538), a check indorsed by the defendant was delivered to the plaintiff's agent at Dousman on July 17th, and was at once mailed to the plaintiff at New Richmond, who received it on the 18th, and at once delivered it to a local bank for collection. This bank had no correspondent in Milwaukee, and immediately mailed the check to its correspondent in Chicago. From Chicago it was forwarded to Milwaukee, and presented on the 21st. If the check had been sent directly to Milwaukee from New Richmond, it would have arrived in time for presentation on the 20th, and would have been paid. The trial court held that sending the check for collection by way of Chicago was not reasonably diligent, and directed a verdict for defendant. On appeal the judgment was sustained, the court saying that, when the defendant delivered the check at Dousman, he had a right to expect that the plaintiff or his agent would present it for payment within a reasonable time, instead of which it was sent to New Richmond, several hundred miles northwest of Milwaukee, and then sent back through Milwaukee to Chicago, and from there returned to Milwaukee. The court then stated how a check should be forwarded and presented in such cases, its rule corresponding to that given by Daniel. The rule is similarly stated in *Holmes v. Roe* (62 Mich. 199).

In *First National Bank of Grafton v. Buckhannon Bank* (80 Md. 475), the plaintiff bank, located at Grafton, W. Va., received on the 12th of January, in payment of a balance due it, a check on J. J. Nicholson & Sons, of Baltimore, and on the same day forwarded it for collection to its correspondent bank in Philadelphia. The Philadelphia bank received it on the 13th, and at once mailed it to its correspondent bank in Baltimore. This bank received it on the 14th, and presented it to the drawee on the same day. The court sustained this presentment, on the ground that the Grafton bank, having sent out the check one day sooner than was necessary, had it in Baltimore for presentment on the day required, notwithstanding its transmission through Philadelphia.

We think that if this rule of commercial law, stated in the various text-books, and affirmed by these recent cases, is to be modified in

derogation of the rights of drawers of checks, it should be done by legislative enactment.<sup>4</sup>

Judgment reversed, and judgment for defendant.<sup>5</sup>

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§ 322 WEST BRANCH STATE BANK *v.* HAINES.

135 IOWA, 313. — 1907.

ACTION at law to recover upon a promissory note. Judgment for defendant, and plaintiff appeals.

WEAVER, C. J. The making and delivery of the note sued upon is admitted by the defendant, but he denies the plaintiff's right to recover thereon on the following grounds: He alleges that said note, with \$200 in cash, was delivered by him to the plaintiff in payment or exchange for a draft or check drawn by the plaintiff on Gilman, Son & Co., of New York city, under the following circumstances: Defendant had entered into a contract for the purchase of land in the vicinity of Ortonville, Minn., and to avoid a forfeiture of such contract he was required to be ready to pay the sum of \$2,600 thereon upon the 8th day of October, 1902, or as soon thereafter as the seller was able to present an abstract showing good title to the land. On the near approach of said date there was a prospect that the seller would be delayed for a time in making the proper showing of title, and defendant, as he alleges, was advised by the plaintiff bank and its officers that it was better, for the protection of his own interests, that he avoid any appearance of default on his part and have the amount of the agreed payment forwarded to Ortonville, ready to be delivered to the seller on the day named or as soon thereafter as the abstract of title should be perfected. To that end he says the said bank on October 7, 1902, issued to him a check or draft on Gilman, Son & Co., of New York city, for the sum of \$2,600, in consideration of which he then and there paid said bank \$200 in money and executed the note now in suit. Said draft or check, it is claimed, was issued by the bank with the express knowledge and understanding

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<sup>4</sup> Laws of Vt., 1896, No. 38: "In order to hold the maker, indorser, guarantor, or surety of any check or draft deposited with or forwarded to any individual or bank for collection, or owned by any individual or bank, it shall be sufficient for said individual or bank to forward the same in the usual commercial way now in use, according to the regular course of business, and the same shall be considered due diligence in the collection of such check or draft." — H.

<sup>5</sup> There is some authority for the proposition that the usual or customary method of forwarding may be safely used, even though it is circuitous. *Wallace v. Agry*, 4 Mason (U. S.) 336; 5 *Ib.* 118; *Smith v. Janes*, 20 Wend. (N. Y.) 193; *Taylor v. Sip*, 30 N. J. L. 284, 291. — H. [See *Plover Sav. Bk. v. Moodie*, 135 Iowa, 685, *post*, p. 735. — C.]

that its presentation for payment was likely to be delayed a few days because of the matters above related, and was promptly forwarded to Ortonville, where it was received on October 9, 1902. Seven days thereafter, and before the sale and transfer of the land had been perfected, and before any presentation of said check or demand made for its payment, Gilman, Son & Co., being insolvent, made an assignment in bankruptcy. It is further alleged that, when the insolvency and bankruptcy of said drawee was discovered, said check was presented to the plaintiff bank for payment, and payment thereof was refused, thus causing an entire failure of the consideration of the note in suit. It is further alleged that at and prior to the issuance of said check or draft the plaintiff bank knew that Gilman, Son & Co., were insolvent and liable to suspend payment at any time, but fraudulently concealed such fact and information from the defendant.<sup>6</sup> The court having refused to set aside the verdict of the jury in defendant's favor, a reversal of the judgment is sought in this court upon grounds hereinafter considered. \* \* \*

According to the general tenor of the testimony a draft purchased and forwarded from West Branch to Ortonville, Minn., on October 7th, and forwarded thence without intermediate negotiation to New York, would ordinarily be presented to the drawee somewhere from October 12th to October 14th. Taking the average of these dates, a delay of about three days had occurred when the correspondent closed its doors. Now, while it is true that the court may sometimes determine the reasonableness or unreasonableness of delay in presentation of a negotiable instrument as a matter of law, the question is ordinarily one of fact. As between the drawer and payee in this case, the question whether the delay was reasonable depends upon circumstances disclosed in evidence. If the bank knew that appellee desired to send the draft to Ortonville, to be there held for a few days for the completion of the land purchase, and issued the paper to him for that purpose, then appellant can claim no advantage from the fact that it was not forwarded to New York for payment on the same or following day, provided, of course, that such delay was reasonably necessary for the accomplishment of the known purpose for which it was obtained. Obviously this is a question for the jury to consider and pass upon, in view of all the proved facts and the ordinary course and methods of business. Bank drafts or bills of exchange differ from ordinary bank checks, in that the latter usually contemplate practically immediate presentation for payment. This is especially true when the check is drawn upon a bank in the town or city where both drawer and payee reside. On the other hand, a bank draft, bill, or check upon a distant bank, used as a means of transmission of

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<sup>6</sup> For the court's holding on this proposition, see the extract from this case printed in note 8, *ante*, p. 522. — C.

funds between different sections of the country, is more usually than otherwise negotiated, and passes through various hands, and serves the purpose of perhaps many persons before final presentment. For instance, a resident of Iowa may send a New York draft to a creditor in San Francisco, and the latter may indorse it to his own creditor in Chicago, and the latter in turn indorse it to his creditor in New York, who indorses it to his local bank, which presents it to the drawee for payment. Sent directly from the place of its issuance, such draft would have been presented within from two to four days of its date; but by the circuitous route we have described its transmission requires ten days or more. Yet no one, we think, would contend for the proposition that a delay in presentment thus occasioned would work a discharge of the drawer. Of course, if any person to whom the bill is indorsed fails to promptly negotiate and pass it along on its course to final presentation, and loss follows, he alone must bear it, unless the delay has been occasioned with the express or implied consent of the drawer. If a person, being about to set out upon an extended visit to a distant state, and wishing to carry his funds in bank drafts to be negotiated from time to time as he may need the money, applies to his banker, who issues the desired paper, knowing the purpose for and the manner in which it is to be used, we think it unquestionable that the risk of loss by the insolvency of the drawee is not shifted from the drawer to the payee simply because the latter does not put the bills in immediate course of collection.

So in the case before us it is claimed by the appellee, and there is evidence tending to uphold his contention, that the appellant issued the draft to be sent by the former to Ortonville, knowing it was expected or liable to be there held temporarily for the completion of the transfer of the land which he was purchasing. The delay was not so great that we can say it was manifestly beyond the contemplation of the parties. Such being our view of the merits of the case, we have to say that the appellant's motions for a directed verdict were correctly overruled, and the cause was properly submitted to the jury. As bearing upon the case presented, see Story on Bills, §§ 472-473; 1 Daniel, Neg. Insts. (5th Ed.) 466-469; 2 Daniel, Neg. Insts. (5th Ed.) 1595a; *Montelius v. Charles*, 76 Ill. 305.

Most of the authorities cited to us by the appellant have direct reference to the measures which the payee of a bill must take in order to charge an indorser — rules which are not always equally applicable to the drawer. Other authorities called to our attention are not inconsistent with the conclusion reached by us. We do not attempt to determine the weight or preponderance of the evidence. That was the province of the jury alone. The finding was adverse to the plaintiff, and we are not at liberty to set it aside.

The judgment of the District Court is affirmed.

*(b) Effect of delay upon indorser's liability.*

## § 322

START *v.* TUPPER.

81 VERMONT, 19. — 1908.

JUDGMENT for plaintiff and defendant appeals.

MUNSON, J. On the 22nd of August, 1906, the defendant, the payee of the check in suit, delivered it to the plaintiff, duly indorsed, in payment of a pre-existing indebtedness of less amount and received the difference in cash. The check was dated August twentieth, and was drawn on a bank in Melrose, Mass. The plaintiff held it six days before forwarding it for collection. It was presented and protested for want of funds September fourth. August twenty-fourth was the last day on which payment would have been made. The case states that the defendant is sued as indorser.

Most of the facts, including those above recited, were shown by an agreed statement. The evidence before the jury was with reference to what "the usual commercial way now in use" required of the bank through which the check was forwarded, and when the check would have been presented for payment if it had been received by the collecting bank on the twenty-third of August, and been forwarded in the way required. Several exceptions were taken to the admission and rejection of testimony. The defendant rested without offering evidence and moved for a verdict, and his motion was overruled on the ground that the defendant was not damaged by the plaintiff's neglect, inasmuch as the check would not have been paid if forwarded in due course. The plaintiff then moved for a verdict on the ground indicated, and a verdict was ordered accordingly, to which the defendant excepted.

It is not necessary to consider the exceptions relating to the evidence. The agreed statement shows a failure to forward in due course, and this is decisive of the case presented. The considerations on which the holder of a check drawn without funds is permitted to excuse his neglect as against the drawer, are not applicable to an indorser. The drawer is presumed to know the insufficiency of the fund, while the indorser is entitled to rely on its sufficiency. The drawer is the one primarily liable, and prompt presentment and notice of non-payment may enable the indorser to secure himself. The indorser's liability is impliedly conditioned on this being done, and a failure therein will discharge him, even though presentment in due course would have been unavailing. In default of presentment and notice, an indorser can be charged only by affirmative proof that he knew when he passed the check that there were or would be no funds in the bank to meet it. Daniel Neg. Inst. 1587, 1596, 1646; *Humphries*

v. *Bicknell*, Litt. 297; *Carroll v. Sweet*, 128 N. Y. 19; see *Nash v. Harrington*, 2 Aik. 9.<sup>7</sup>

Judgment reversed and cause remanded.<sup>8</sup>

## § 322

## PLOVER SAVINGS BANK v. MOODIE.

135 IOWA, 685. — 1907.

WEAVER, J. On March 8, 1903, one C. F. Scholer, who was a depositor in the Greenville Bank, doing a banking business at Greenville, Clay county, Iowa, made and delivered to one Claude Heathman his check on said bank payable to the order of said Heathman for the sum of \$50; and thereafter on March 12, 1903, said Scholer made and delivered to said Heathman another similar check on the same bank for the further sum of \$50. On or about the last-mentioned date Heathman indorsed and delivered both checks to the appellant. On Friday, March 13, 1903, near the close of business

<sup>7</sup> "The dispute in this case is between the indorsee and the indorsers of a check. The following rules of the law merchant fixing the rights, duties, and liabilities of indorsee and indorser each to the other . . . are well settled: The undertaking of the indorser of a check is that, if not paid on presentation within a reasonable time, he will pay it, provided he is properly notified. Such reasonable time for presentation and demand for payment is admitted to be within the day following the indorsement. The indorsee, as between himself and the indorser, undertakes to demand payment within the day following the indorsement, and, if payment is not made, to give due notice of dishonor. This is his sole duty, and he does anything else at his peril. 2 Daniel on Negotiable Instruments (5th Ed.), § 1601; *People ex rel. Port Chester Savings Bank v. Cromwell*, 102 N. Y. 477. The fact that there are no funds in the account against which the check is drawn does not relieve the holder from presentation and notice of dishonor to the indorser, unless it appears that the indorser knew it. 2 Daniel on Negotiable Instruments (5th Ed.), § 1596; 1 Morse on Banks and Banking (4th Ed.), § 262, subd. 8. Nor are the rights of the indorser changed because he suffered no apparent damage by reason of failure to demand payment and give notice of dishonor to him within the required time. *Mohawk Bank v. Broderick*, 13 Wend. (N. Y.) 133; *Tiedeman on Commercial Paper*, § 442; *Gough v. Staats*, 13 Wend. (N. Y.) 549; *First Nat. Bank of Wymore v. Miller*, 37 Neb. 500." *McAlvay, C. J.*, in *First Nat. Bank of Detroit v. Currie*, 147 Mich. 72, 77. — C.

<sup>8</sup> This case is reported in 15 L. N. S. 213, with the following note: "The general rule that the failure to present a check for payment within a reasonable time releases the indorser from liability thereon, even though presentment in due time would have been unavailing and he was not prejudiced by the failure to present in due time, is discussed in a note to the case of *Kirkpatrick v. Puryear*, 22 L. R. A. 785 [93 Tenn. 409]. The only case, besides the *Start* case, bearing on the precise question, decided since the publication of the note just mentioned, is that of *Travers v. T. M. Sinclair & Co.*, 122 Ill. App. 203, in which the same rule is approved. See also 2 Morse, Banks and Banking, 4th ed. § 422; 2 Dan. Neg. Inst., 5th ed. § 1596." — C.

hours, the appellant indorsed and delivered the checks to the appellee bank which was doing business at Plover, in Pocahontas county, Iowa, and received in exchange therefor a certificate of deposit for \$100 which was afterward paid. While the towns of Plover and Greenville are but 45 miles apart they are on different lines of railway, and the course of the mails between them is quite indirect, and had the appellee forwarded the checks by letter to the Greenville Bank on Saturday they would probably not have reached their destination until after banking hours on Monday, March 16th. Instead of sending them direct to Greenville, the appellee, following its customary method in such matters, sent the checks to its correspondent, the Des Moines Savings Bank at Des Moines, Iowa, by the first mail in that direction on Saturday, March 14th. On Monday, March 16th, the Des Moines Savings Bank forwarded the checks to their correspondent the Citizens' State Bank at Spencer, Clay county, Iowa, where they were received on March 17th. On the same day the Citizens' State Bank turned the checks over to the Citizens' National Bank of Spencer, which was the local correspondent of the Greenville Bank. On the following day, March 18th, the Citizens' National Bank forwarded them direct to the Greenville Bank. The daily mail from Spencer to Greenville does not leave until some time in the afternoon, and if the checks reached Greenville on March 18th, as they doubtless did, it was after banking hours, and were not received by the bank until the morning of March 19th. Prior to this date, probably about March 16th or 17th, the drawer had stopped payment on the checks claiming that they had been procured from him by fraud, and acting upon this notice the Greenville Bank on March 19th declined to honor them, and caused them to be duly protested. Thereupon, the appellee instituted this action at law to recover upon the appellant's indorsement of the checks. The appellant answered denying liability upon said indorsement because of appellee's alleged negligence in presenting the checks for payment. Other defenses pleaded are not urged in argument, and we need not consider them. In addition to these matters it was also shown in evidence, without substantial dispute, that the method adopted by appellee and by the several correspondents mentioned in forwarding the paper for presentation and demand of payment was in accordance with the general custom prevailing among banks in dealing with checks drawn on other banks not doing business in the same city or town, and cashed by the receiving bank. No evidence was offered tending to show that either of the banks, receiving these checks after their indorsement by appellant, failed to forward them on their way on the day of the receipt or on the following day, except possibly in the case of the Des Moines Savings Bank, and the day there intervening, if any, was Sunday. At the close of the testimony offered on the trial, the court sustained a motion to direct a verdict for the plaintiff for the amount

of the checks with interest, and from the judgment entered on such directed verdict the defendant appeals.

The single question to be determined is whether this record presents a case in which a verdict for the defendant, if one had been returned, could properly be permitted to stand. Counsel's contention in support of the appellant's position is based upon two propositions.

1. It is said that in failing to forward the checks by the most direct route from Plover to Greenville, and by electing to send them by a more circuitous route through the hands of correspondent banks, appellee occasioned an unreasonable delay in the presentation of the checks to the drawee for payment, and thereby discharged the appellant from liability as an indorser thereon. By the terms of the negotiable instrument statute a bank check, in the ordinary form, is classed as a bill of exchange payable on demand. Code Supp. 1902, § 3060-a185.<sup>9</sup> By the same statute it is provided that to charge the indorser of a bill of exchange payable on demand, presentation to the drawee and demand of payment shall be deemed sufficient if made within a reasonable time after its issue, or after the last negotiation of such bill. Code Supp. 1902, § 3060-a71.<sup>1</sup> It is also further provided that, in determining what is a "reasonable time" within the meaning of this act, regard must be had to the nature of the instrument, the usage of the trade or business, if any, with respect to such instruments, and the facts of the particular case. Code Supp. 1902, § 3060-a193.<sup>2</sup> Contrary to the requirement for notice to the indorser of the dishonor of a check or bill upon presentation for payment (Code Supp. 1902, § 3060-a103),<sup>3</sup> the holder of the indorsed paper is not held to any fixed or invariable limit of time in which to make such presentment and demand. He is required to act with reasonable diligence and promptitude taking into consideration the nature of the instrument, the usages of the business world and the peculiar facts, if any, attending the particular transaction in hand.

With this rule as our standard, we are clearly of the opinion that the record presents nothing to support a finding that the delay, if any, in presenting the checks for payment was chargeable to negligence on part of the appellee. It was shown by the evidence without controversy — indeed, it is a matter of common knowledge — that, by the system to which the handling of such business has been reduced, the innumerable checks and bills received by the banks scattered all over the country flow in concentrating currents to distributing banks, whence they go out to correspondent banks at or near the city or town where the drawee banks are located, for collection. To

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<sup>9</sup> N. Y., § 321. — C.

<sup>1</sup> N. Y., § 131. — C.

<sup>2</sup> N. Y., § 4. — C.

<sup>3</sup> N. Y., §§ 174-175. — C.



hold that the time between the issue of a check upon a distant bank and its presentation for payment by this method is unreasonable, and serves to discharge the indorser, would not only tend to create disastrous confusion in this most important branch of business, but to a disregard of the statute which makes the usage in such business one of the standards by which the reasonableness of the time of presentation for payment is to be determined. Again, as disclosed by the testimony, the transaction under consideration was not a simple matter of collecting checks deposited with the appellee for that purpose. The checks were negotiated by the appellant to the appellee who paid full value therefor. The appellee indorsed the checks to the Des Moines Savings Bank, receiving credit upon its deposit account with the latter for the full amount as for a deposit of so much cash. In other words, the checks were negotiated by the appellee to the Des Moines Savings Bank, and under the statute already quoted (Code Supp. 1902, § 3060-a71) reasonable time for presentation and demand is to be reckoned from the last negotiation of the paper. Checks are an almost universal substitute for money. They pass from hand to hand, bank to bank, and city to city, and, within reasonable limits, it may be said that no matter how long they remain outstanding, so long as one negotiation promptly follows another and the checks are in fact in circulation the statute requires us to hold that the indorser is not legally prejudiced by the consequent delay in their presentation for payment. Indeed, while at common law it is generally held that when one receives a check payable at a distant bank reasonable diligence requires him to forward it for presentation not later than the next business day thereafter, yet it is equally well settled that this rule is not always one of imperative obligation, but is at times made to give way by reason of circumstances which sufficiently rebut any presumption or inference of negligence on part of the holder. *Coal Co. v. Bowman*, 69 Iowa, 152. And, among other circumstances having a bearing upon this question, the general course of business has always been recognized as important. *Guelich v. Bank*, 56 Iowa, 434; *Freiberg v. Cody*, 55 Mich. 108; *Bridgeport Bank v. Dyer*, 19 Conn. 136. Thus, even without the statute it would be extremely doubtful whether a verdict for the appellant upon the ground here contended for could be upheld; and with it, we think, the correctness of the ruling of the trial court thereon is not open to serious question. \* \* \*

3. Error is assigned upon the ruling of the trial court refusing to permit the appellant to testify to his want of knowledge of the custom of banks with respect to the manner of transmitting checks for payment. To this exception we think it a sufficient answer that want of knowledge by one who negotiates and indorses a check, as to the usage of banks relating to its presentation for payment, cannot prevent the application of the statute which makes such usage a factor in

determining whether due diligence has been shown. So, also, it may be said that the usage or custom here relied upon is not one of mere private or local character, but one of general observance in the banking business and as such will be presumed to be known by all persons dealing with such institutions. See 12 Cyc. p. 1044. Appellant knew that the checks were negotiable in character and as such were liable to pass from one indorser to another in their transmission to the bank of payment, and when he negotiated them he must be held to have done so with reference to the usual and ordinary manner in which such business is transacted, and to have consented to presentation, demand of payment being made in the manner which generally prevails among prudent, well-conducted banks. Had he negotiated them to a merchant or farmer or other individual who in turn negotiated them to the appellee bank, appellant being sued upon his indorsement would not be heard to deny knowledge of the usage of banks with respect to such business, and we cannot see that such want of knowledge would be of any more avail in a case like the present one where he indorses the paper direct to the bank. His contract, implied from his indorsement, was that if, upon presentation and demand within a reasonable time, the checks were dishonored, and due notice given thereof, he would make them good to his indorsee, and it can make no difference whether he did or did not understand what in law would be held a reasonable time for such presentment. Other questions argued are ruled by those already discussed, and we need not further consider them. Of course, we are not to be understood as holding that banks are at liberty to adopt any usage or manner of business they see fit, and escape all imputation of negligence for resulting losses to those with whom they may deal. It is reasonable to hold that checks must go forward for presentation with due regard to the interest of the drawers and indorsers, and if banks adopt unreasonably circuitous routes and methods whereby loss results they should bear the burden, but, ordinarily, the natural caution which is engendered by self-interest will be sufficient to insure promptness and dispatch in the discharge of duties of this nature. Where, however, there is reasonable ground upon which to base the charge of negligence, the case should go to the jury under proper instructions.

In the instant case we find nothing to support a finding of this nature, and the judgment of the District Court is affirmed.

*Supplemental opinion on rehearing.*

PER CURIAM. In his petition for rehearing, the appellant insists that the opinion handed down upon the original submission of this cause erroneously cites Code Supp. 1902, § 3060-a71, as applicable to the presentation for payment of bank checks, when in fact the rule there prescribed is intended to apply only to drafts or bills of ex-

change as distinguished from checks, and that the latter are governed solely by the provisions of Code Supp. 1902, § 3060-a186.<sup>4</sup> The section first named provides that presentment of a bill of exchange will be sufficient if made within a reasonable time after the last negotiation thereof, while the section last named provides that a check must be presented within a reasonable time after its issue. Whether the language of the last cited section of the statute has the effect to exclude bank checks from the effect of the former it is not necessary for us to decide at this time, for, if we were to adopt the appellant's view in this respect, it could not work a reversal of the case before us. Both sections allow a reasonable time for the presentation, and, where the check is drawn upon a bank located at a place distant from the place of its delivery to the payee or indorser, a presentment promptly made by mail through other banks in the ordinary and usual course pursued in such business will be held as a matter of law to have been made within a reasonable time.

The petition for rehearing is therefore overruled.

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§ 322

CARROLL *v.* SWEET.

128 NEW YORK, 19. — 1891.

ANDREWS, J. The indorsement and transfer by the defendant to the plaintiff of the check of Woodruff operated as provisional payment only of so much of the antecedent debt owing by the defendant to the plaintiff. There was no agreement that it should be taken in absolute satisfaction of the debt, and, in the absence of such an agreement, the intendment of law is that it was conditional payment only. *Hill v. Beebe*, 13 N. Y. 566; *Bradford v. Fox*, 38 N. Y. 289. The debt remained until discharged by payment of the check, or by such dealing with the check by the plaintiff as would, in judgment of law, convert what was originally a provisional payment into an absolute one. The check was dated August 22, 1887, and was drawn on the Asbury Park National Bank, and was on the same day indorsed and delivered by the defendant to the plaintiff at the place where the bank was located. The plaintiff, on accepting the check, assumed, as between himself and the defendant, an obligation to present the same to the bank for payment within the time prescribed by the law merchant, — that is to say, not later than the next day after its date, — and, if refused, to protest the same, and give notice of non-payment. *Smith v. Janes*, 20 Wend. 192. It was not presented until the 31st of August, nine days after it was received by the plaintiff. The defendant was by such delay discharged from liability as indorser of

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<sup>4</sup> N. Y., § 322. — C.

the check, irrespective of any question of loss or injury.<sup>5</sup> Presentment in due time, as fixed by the law merchant, was a condition upon performance of which the liability of the defendant as indorser depended, and this delay was not excused although the drawer of the check had no funds, or was insolvent, or because presentment would have been unavailing as a means of procuring payment. *Bank v. Broderick*, 10 Wend. 304; *Gough v. Staats*, 13 Wend. 549. A different rule obtains as between the holder and drawer of a check. As between them presentment may be made at any time, and delay in presentment does not discharge the liability of the drawer, unless loss to him has resulted. *Little v. Bank*, 2 Hill, 425. The action here is not upon the indorsement of the defendant, but upon the original indebtedness. If the discharge of the defendant's liability as indorser discharges also his liability as debtor for the original debt, the judgment must on that ground be reversed. \* \* \*

The court in this case directed a verdict for the plaintiff, and in this we think there was error. It cannot be doubted that if there was evidence tending to show that the delay in presenting the check to the Asbury Park Bank prevented its collection, or from which the jury might find that the whole or any part of the debt owing by the drawer of the check to the defendant, for which the check was given, was lost by reason of the delay in the presentment, or by dealings between the plaintiff and the drawer, in respect to the check, without the assent of the defendant, the case should have been submitted to the jury. To the extent of the injury, the law would treat the omission to make due presentment as tantamount to payment.

The facts most favorable to the defendant need to be stated. Woodruff, the maker of the check, was, when the check was given, conducting a hotel at Asbury Park, and the parties to the action were guests at his house. The defendant was indebted to the plaintiff for dentistry work, and the former, who resided in New York, had loaned money to Woodruff for which the check was given, and on the same day the defendant received the check he delivered it to the plaintiff on his debt. Woodruff had an account with the Asbury Park National Bank. On the day of the date of the check the bank charged to his account a demand note held by the bank against him for \$500, but, so far as appears, without any notice to Woodruff, and this rendered his bank account overdrawn. Woodruff was in embarrassed circumstances, but was in the daily receipt of about \$600 from his business. He used part of the receipts for current expenses, without depositing them, and between the 22d and 31st of August he deposited about \$900 in the bank to the credit of his account, and the inference is that it was applied in part to pay the \$500 note, and in

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<sup>5</sup> See *Aebi v. Bank of Evansville*, 124 Wis. 73, at page 78, and extract from *First Nat. Bank v. Currie*, 147 Mich. 72, in note 7, ante, p. 735. — C.

part to pay current checks drawn by Woodruff. On the 22d of August, the day on which Woodruff's check to the defendant is dated, and after it had been indorsed to the plaintiff by the defendant, Woodruff, who had been informed of the transfer, requested the plaintiff to accommodate him by holding the check a few days, stating as a reason that he was pressed in the payment of his accounts, to which request the plaintiff assented. He asked the plaintiff to let him know when he wished to use the check, as he would then provide for it. Woodruff testified that he had money in his office sufficient to pay the check, and would have paid it at any moment, had payment been insisted upon; that he was in the receipt of about \$600 a day, and that he redeemed a number of other checks which went to protest at this time; that, two or three days after the conversation of the 22d of August, he spoke to the plaintiff again, and the plaintiff informed him that he had sent the check west. Woodruff said to him that he regretted it very much, as he wished to make provision for the check. The cashier of the bank testified that there were no funds to meet the check, and that it would not have been paid if it had been presented any time after the 22d of August. On August 31st, Woodruff, who was behind in his rent, was dispossessed from the hotel premises, and his business was closed, and he then was and now is insolvent. It may be conceded that the only obligation upon the plaintiff, as between him and the defendant, was to present the check at the bank for payment within the time prescribed by law, and, if payment was refused, to have the same protested, and notice of non-payment given to the defendant. If he had performed this duty, the defendant would have been apprised of the default; and he would have had an opportunity to take such measures as he could to secure payment from Woodruff. One of the objects of requiring prompt notice to be given to indorsers and other parties secondarily liable on commercial paper, in case of default, is that they may have an opportunity to secure themselves. Checks are supposed to be drawn against funds of the drawer, and *prima facie*, where it is shown that the drawer's account was not good, the inference of injury from non-presentment would be rebutted. But where, as in this case, it is shown that the maker of the check was solicitous that it should be paid; that he had the means of payment at command, and would have provided for or paid the check if payment had been insisted upon; that the holder was apprised of the facts, and, for the accommodation of the maker, refrained from presenting the check, and presentation was delayed until open insolvency of the maker occurred, and he became, by the change of circumstances, unable to provide for the check, — it cannot be said, we think, that there was no legal evidence of injury to be submitted to the jury. The plaintiff, instead of taking the usual course, undertook to deal with the maker of the check in disregard of his primary obligation to the defendant. It was for the jury to

pass upon the circumstances, and to find whether the conduct of the plaintiff imposed a pecuniary injury upon the defendant. To the extent of such injury the law adjudges that the debt of the plaintiff has been paid. The judgment below should be reversed, and a new trial granted, with costs to abide the event. All concur.<sup>6</sup>

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### 3. CERTIFICATION OF CHECK.

#### (a) *Effect upon Drawer's Liability.*

§ 324

MINOT v. RUSS.

HEAD v. HORNBLOWER.

156 MASSACHUSETTS, 458. — 1892.

FIELD, C. J. — The first case is an appeal from a judgment rendered by the Superior Court for the defendant, on his demurrer to the declaration. The defendant, on October 29, 1891, drew a check on the Maverick National Bank, payable to the order of the plaintiff, and, being informed by the plaintiff that the check must be certified by the bank before it would be received, the defendant on the same day presented the check to the bank for certification, and the bank certified it by writing on the face of the check the following: "Maverick National Bank. Pay only through Clearing-House. J. W. Work, Cashier. A. C. J., Paying Teller." After it was certified, the check was, on Saturday, Oct. 31, 1891, delivered by defendant to the plaintiffs, for a valuable consideration. The declaration alleges that the bank stopped payment on Monday morning, November 2, 1891, "before the commencement of business hours on that day," and that on that day payment was duly demanded of the bank, and notice of non-payment was duly given to the defendant.

The second case is an appeal from a judgment rendered for the defendants by the Superior Court, on an agreed statement of facts. On Saturday, October 31, 1891, the defendants drew their check on the Maverick National Bank, payable to the order of the plaintiffs, and delivered it to them in payment of stocks bought by the defendants of the plaintiffs. The check was received too late to be deposited by the plaintiffs for collection in season to be carried to the clearing-house on that day, but during banking hours on that day the plaintiffs presented the check to the Maverick National Bank

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<sup>6</sup> See *Manitoba Mortgage and Investment Company, Limited v. Weiss*, 18 S. Dak. 459, reported in 5 A. & E. Ann. Cas. 868, with note entitled, "Discharge of debtor by creditor's negligence in presenting check of third person for payment." — C.

for certification, and the bank certified it by writing or stamping on its face the following: "Maverick National Bank. Certified. Pay only through Clearing-House. C. C. Domett, A. Cashier. ———, Paying Teller."

At that time the defendants had on deposit sufficient funds to pay the check, and the bank on certification charged to the defendants' account the amount of the check, and credited it to a ledger account called certified checks, in accordance with their uniform custom. After certification, the plaintiffs, on the same day, deposited the check in the Hamilton National Bank for collection. It is agreed that if the check had been presented for payment on Saturday, in banking hours, it would have been paid; but the Maverick National Bank transacted no business after Saturday, and on Sunday the Comptroller of the Currency placed a national bank examiner in charge, and the bank was put into the hands of a receiver. The clearing-house on November 2 refused to receive checks on the Maverick National Bank, and the check was on that day duly presented for payment, and due notice of non-payment was given to the defendants.

Each of the checks was in the ordinary form of check on a bank, and was payable on demand, and no presentment for acceptance or certification was necessary. In a sense, undoubtedly, a check is a species of bill of exchange, and in a sense also it is a distinct commercial instrument; but according to the general understanding of merchants, and according to our statutes, these instruments were checks, and not bills of exchange. "A check is an order to pay the holder a sum of money at the bank, on presentment of the check and demand of the money; no previous notice is necessary, no acceptance is required or expected, it has no days of grace. It is payable on presentment and not before." (*Bullard v. Randall*, 1 Gray, 605, 606.) The duty of the bank was to pay these checks when they were presented for payment, if the drawers had sufficient funds on deposit. The bank owed no duty to the drawers to certify the checks, although it could certify them if it saw fit, at the request of either the drawers or the holders, and if it certified them it became bound directly to the holders, or to the persons who should become the holders. In either case, the bank would charge to the account of the drawer the amount of the check, because by certification it had become absolutely liable to pay the check when presented. When a check payable to another person than the drawer is presented by the drawer to the bank for certification, the bank knows that it has not been negotiated, and that it is not presented for payment, but that the drawer wishes the obligation of the bank to pay it to the holder when it is negotiated, in addition to his own obligation. But when the payee or holder of a check presents it for certification, the bank knows that this is done for the convenience or security of the holder. The holder could demand payment if he

chose, and it is only because, instead of payment, the holder desires certification, that the bank certifies the check instead of paying it. In one case the bank certifies the check for the use or convenience of the drawer, and in the other for the use or convenience of the holder. In the present cases the checks were seasonably presented to the bank for payment, and on the facts stated the defendants would be liable unless the certification discharged them from liability.

It is argued that the certification of a check, whereby the bank becomes absolutely liable to pay it at any time on demand, discharges the drawer, because it is said that the check then becomes in effect a certificate of deposit; and it is also argued that the certification is in effect only an acceptance of a bill of exchange, and that if payment is duly demanded of the bank and refused, and notice of non-payment duly given, the drawer is held. So far as the question has been considered, it has been decided that the certification of a bank check is not, in all respects, like the making of a certificate of deposit, or the acceptance of a bill of exchange, but that it is a thing *sui generis*, and that the effect of it depends upon the person who, in his own behalf, or for his own benefit, induces the bank to certify the check. The weight of authority is, that if the drawer in his own behalf, or for his own benefit, gets his check certified, and then delivers it to the payee, the drawer is not discharged; but that if the payee or holder, in his own behalf or for his own benefit, gets it certified instead of getting it paid, then the drawer is discharged. (*Born v. First National Bank*, 123 Ind. 78; *Rounds v. Smith*, 42 Ill. 245; *Brown v. Leckie*, 43 Ill. 497; *Andrews v. German National Bank*, 9 Heisk. 211; *First National Bank v. Leach*, 52 N. Y. 350; *Boyd v. Nasmith*, 17 Ont. 40; *Essex County Bank v. Bank of Montreal*, 7 Biss. 193; *First National Bank v. Whitman*, 94 U. S. 343, 345; *Metropolitan National Bank v. Jones*, 27 N. E. Rep. 533; *Continental National Bank v. Cornhauser*, 37 Ill. App. 475; *National Commercial Bank v. Miller*, 77 Ala. 168; *Larsen v. Breene*, 12 Col. 480; *Mutual National Bank v. Rotge*, 28 La. An. 933; *Morse on Banking*, §§ 414, 415.) We are of opinion that this view of the law rests on sound reasons. If it be true that the existing methods of doing business make the use of certified checks necessary, the persons who receive them can always require them to be certified before delivery. If they receive them uncertified and then present them to the bank for certification instead of payment, the certification should be considered as discharging the drawer.

It may also be said, that in the second case the certification amounted to an extension of the time of payment at the request of the payees, without the consent of the drawers. Before the certification the drawers could have requested the payees to present the check for payment on Saturday, or could themselves have drawn out the money and paid the check. After certification the amount



of the check no longer stood to the credit of the drawers, and the payees had accepted an obligation of the bank to pay only through the clearing-house, which could not happen before the following Monday.

The result is that in the first case the judgment is reversed, and the demurrer overruled, and in the second case the judgment is affirmed.

So ordered.<sup>7</sup>

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§ 324 TIMES SQUARE AUTOMOBILE CO. v. RUTHERFORD NATIONAL BANK.

77 NEW JERSEY LAW (CT. ERR. & APP.) 649. — 1909.

GUMMERE, C. J. One Purdy, being desirous of purchasing a second-hand automobile, employed Millard Ashton, an automobile salesman, to assist him in making a proper selection. Ashton took him to the salesroom of the Times Square Automobile Company, and, after looking over its stock, Purdy, with Ashton's approval, selected a car, the price of which was \$600, and gave his check on the Rutherford National Bank for the purchase price. The check was drawn to the order of Ashton, who indorsed it and delivered it to the manager of the automobile company. Immediately after receiving it, the automobile company sent it by special messenger to the banking house of the Rutherford National Bank with a request that it be certified. This request was complied with. Afterward, when the check was presented for payment, the bank refused to honor it, upon the ground that it had received instructions from Purdy not to pay it. The automobile company thereupon brought suit against the bank on its contract of certification. The defendant admitted that it had certified the check, and that it did so at the request of the plaintiff, the holder thereof, but sought to justify its refusal to pay upon the ground that Purdy had been induced to purchase the car by false representations made by the manager of the plaintiff as to its condition and value. It was contended on behalf of the plaintiff that this defense was not open to the defendant. It was, however, admitted over its objection. At the close of the case plaintiff asked for a direction of a verdict in its favor. This request was refused, the case was sent to the jury, and a verdict in favor of the defendant was rendered. The plaintiff now seeks a reversal of the judgment entered upon that verdict, on the ground that its request for a direction in its favor should have been complied with.

The effect of the certification of a check by the bank upon which

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<sup>7</sup> See 5 Am. & Eng. Encyc. L. (2d ed.) pp. 1055-1056. — H.

it is drawn depends upon whether it is done at the request of the drawer or of the holder. When a check is presented by the drawer for certification, the bank knows that it has not yet been negotiated, and that the drawer wishes the obligation of the bank to pay it to the holder, when it is negotiated, in addition to his own obligation. A certification under such circumstances does not operate to discharge the drawer (*Minot v. Russ*, 156 Mass. 460, 5 Amer. & Eng. Ency. of Law, 1056); and so long as the drawer remains undischarged, such a defense as that set up in the present case is open both to him and to the bank. But when the certification by the bank is done at the request of the holder, the effect is radically different. The transaction, then, is virtually this: The bank says: "That check is good; we have the money of the drawer here ready to pay it; we will pay it now, if you will receive it." The holder says: "No, I will not take the money now; you may retain it for me until the check is presented for payment." The bank replies, "Very well, we will do so." *First Nat. Bank of Jersey City v. Leach*, 52 N. Y. 353. The result is to discharge the drawer from any further liability on the check (Negotiable Instrument Act April 4, 1902, § 188<sup>8</sup> [P. L. p. 614]), and to substitute a new contract between the holder and the bank by the terms of which the money called for by the check is transferred from the account of the drawer to the account of the holder. In contemplation of the law the obligation of the bank to the holder, when the certification is at his request, is the same as if the funds had been actually paid out by the bank to him, by him redeposited to his own credit, and a certificate of deposit issued to him therefor. 5 Amer. & Eng. Ency. of Law, 1055; Dan. on Neg. Inst., § 1603.

The defendant, in refusing payment of Purdy's check, apparently considered that its obligation to the holder was no greater than if its certification had been made at Purdy's request. It failed to realize that its act operated as a payment of the check, so far as Purdy was concerned, and transferred the moneys which it called for to the account of the plaintiff. The situation was the same, so far as the defendant was concerned, as if Purdy had paid cash to the plaintiff for the car which he had purchased, and the plaintiff had then deposited the cash in the defendant's bank. Having accepted the plaintiff's money, and issued to him a certificate of deposit therefor, it did not concern the defendant from whom, or how, or under what circumstances the money had been obtained. Its contract required it to pay the amount of the deposit to the plaintiff, or its order, and it could not avoid its obligation to do so by showing that the plaintiff had fraudulently obtained the money which it had deposited with the defendant.

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<sup>8</sup> N. Y., § 324. — C.

The defense interposed should have been overruled, and a verdict directed for the plaintiff. The judgment under review will be reversed.\*

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(b) *Effect upon indorser's liability.*

§ 324 FIRST NATIONAL BANK OF DETROIT *v.* CURRIE,

ET. AL.

147 MICHIGAN, 72. — 1907.

DEFENDANTS were in partnership as brokers in Detroit. On February 5, 1902, they bought in their own name from a firm of brokers in New York city certain bonds for Frank C. Andrews, one of their customers. In part payment of these bonds Andrews, on February 6, gave them his check for \$50,000, drawn on the City Savings Bank, Detroit, payable to their order. They indorsed this check to the plaintiff bank and deposited it in the plaintiff bank to their credit. Plaintiff sent the Andrews check to the City Savings Bank for certification. It was returned certified, and plaintiff then wired \$50,000 to New York to the credit of the defendants. The certified check was on February 7 presented by the plaintiff to the City Savings Bank for payment, and upon payment being refused it was protested and notice of dishonor duly given to defendants. Andrews' account at the City Savings Bank, both when the check was certified and when payment was demanded, was overdrawn more than \$900,000.

In an action against defendants for money had and received, a verdict was directed for plaintiff for the amount of the check, with

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\* In *Blake v. Hamilton Dime Savings Bank Co.*, 79 Oh. St. 189, C. G. Blake & Co. drew a check on the Franklin Bank payable to the order of C. G. Blake. Blake had the check certified by the Franklin Bank, and then indorsed the check to one Werbel in payment for a horse. Werbel indorsed the check and deposited it in the Hamilton Dime Savings Bank Co., and was given credit for it on the books of the bank. The Hamilton Dime Savings Bank sent the check to a correspondent bank for collection, and it was protested for non-payment for the reason "Payment stopped." The Hamilton Dime Savings Bank sued the Franklin Bank on the check and Blake was substituted as defendant. Blake answered that he had been induced to purchase the horse and deliver the check by the false and fraudulent representations of Werbel. In affirming a judgment for plaintiff the court held that (quoting the syllabus), "The object of certifying a check is to enable a holder to use it as money. The drawer or indorser of a certified check cannot, after its delivery, revoke it or stop payment upon it by notice to the drawee not to pay, and a bank that has received a certified check for deposit, and has credited the depositor with the amount of it, is a *bona fide* holder and may enforce payment of it notwithstanding it may, before payment to the depositor, have received notice that the check was fraudulently obtained by the depositor." Criticised in 22 *Harv. Law Rev.* 448 (April, 1909). — C.

interest. Defendants appeal, contending that the court erred in directing such a verdict, for the following reasons:

"1. That the certification of the check for plaintiff at its request was equivalent to payment, and operated to release them as indorsers.

"2. That plaintiff, on presenting the check, elected to take certification, which is the obligation of the drawee bank to pay, and deferred formal presentation of the certified check for payment until the next day. Had it demanded payment instead of certification, or upon certification, as it should, the check would either have been paid or dishonored. If dishonored, the plaintiff would not have remitted [the \$50,000 to New York], and the bonds would not have been delivered, but remained in defendants' control. Whether paid or not, neither party would have lost anything. So that plaintiff's failure to demand payment at the time of certification caused the loss, and defendants cannot be held therefor."

MCALVAY, C. J. \* \* \* The important question in the case at bar is whether certification of a check on presentation by the indorsee, though there are no funds, is equivalent to payment. As a general proposition we think it is, as to both the maker and indorser. 2 Daniel on Negotiable Instruments (5th ed.), § 1604, and cases cited. The rules of the law merchant are inflexible and arbitrary, and necessarily so. An indorser may always insist that the conditions requisite to make his undertaking enforceable shall be strictly complied with; namely, presentation for payment and notice of dishonor. As to the indorsee the certifying bank is bound by estoppel where he has changed his position or parted with value on the strength of the certification. *Brooklyn Trust Co. v. Toler*, 65 Hun (N. Y.), 187, 138 N. Y. 675, and cases cited.

In this case plaintiff parted with no value before certification, but, relying upon the certification, transferred \$50,000 to New York. We find, then, that as between the plaintiff and the bank there was a new and enforceable contract created by the certification of the check. Ordinarily there would be no question but that such condition released the indorsers. In this case, however, it is claimed that, although the check had not been presented for payment, but for certification, yet upon it as certified payment was demanded, and the check was protested, and notice duly given within the time which the same would have been given had the check been presented for payment instead of certification, and because defendant indorsers have suffered no loss by reason of certification, and are in no different position than if such payment had been demanded, therefore they are not released as indorsers. The claim that no loss has occurred to defendants, which we think is not supported by the facts in the case, can be eliminated, for the reason that the liability of the indorser is not predicated upon his loss. See cases cited, *supra*. The case relied upon by plaintiff to sustain its contention, and also by the

court in directing the verdict, is *Irving Bank v. Wetherald*, 36 N. Y. 335. We think the cases are distinguishable. In that case the note had been discounted by the indorsers, who received the proceeds at the time. It was, therefore, a completed transaction between the indorsers and the indorsee. The indorsee, a bank, presented the note when due at the bank where it was payable and had it certified. Later in the day the certifying bank discovered that there were no funds to pay the note, and before 3 o'clock P. M. notified the holding bank, which refused to recognize the notice. The certifying bank then took up the note, presented it at its own counter, protested it, and notified the indorsers. The certifying bank sued the indorsers. The case recognizing the well-established doctrine that a bank is estopped from denying its certification of a note as good where the presenting bank relies upon its accuracy and fails to protest the note for non-payment and thus releases the indorsers, holds that, where the mistake in certification is discovered, and notice given to the presenting bank in time to make a re-presentation and charge the indorsers, the certifying bank is discharged from further liability, and that the certifying bank in this case took the note as a purchaser and acquired the rights of a holder and could maintain its action against the indorsers. The discounting bank received notice of the mistake before it in any way changed its position. It had not parted with value or released the indorsers on the strength of the certification, otherwise the certification would have been binding.

In the case at bar plaintiff parted with value on the strength of the certification. No enforceable contract was entered into between the parties to this suit because plaintiff never parted with value relying upon the indorsement. As between the certifying bank and the plaintiff there could be no revocation by the bank. There was no claim of mistake on the part of the certifying bank or any attempt to revoke its certification. If the certification was in law a fraud, it was the fraud of Andrews and the certifying bank, of which neither of the parties to this suit had knowledge. The presentment of the certified check to the certifying bank, and its non-payment, was the repudiation by the bank of its independent contract of certification made with the plaintiff. This check as it was when the indorsers parted with it to the indorsee was never presented for payment. The certification was made without the knowledge or consent of the indorsers. Applying to this case the decision in the *Wetherald* case, so far as it has any bearing upon the questions here involved, it is authority for holding that the certifying bank could not avoid liability on its certification, for the reason that plaintiff had parted with value on the strength of it.

It was urged in the trial court, and is urged in this court, that the certification of the check in the absence of funds did not operate

to release the maker from his liability thereon, and therefore the indorsers can occupy no better position than the maker and are not released and upon this theory the trial court decided the case. No authorities are cited to us and we have been able to find none which support this proposition. As already stated, it is a general rule of law that where the holder of a check procures its certification by the bank upon which it is drawn, the drawer and all parties thereto are discharged. The relations of the different parties to a check and the nature of their contracts have already been sufficiently stated. The certification is an entirely new and different contract. By it the certifying bank becomes the primary debtor. The holder has released the maker and indorsers and voluntarily accepted the obligation of the certifying bank. It is not unlawful for one to draw checks upon an overdrawn account. Neither is it unlawful for the bank to pay such a check and to charge the amount thereof against the drawer. In such case, as in any other case, the holder who obtains a certification has elected to accept the obligation of the bank instead of cash. So far as the drawer is concerned the check is paid because the holder by securing certification obtained what he desired as payment. The bank had been directed to pay cash, and when the holder obtained what he preferred to cash, it was none the less a payment. The rule which releases the maker and indorsers of a check upon certification procured by the holder, is not predicated upon the presence of funds in the hands of the certifying bank, but upon the principle that such certification operates as payment, discharging the maker whose contract has been fulfilled, and the indorser who was the guarantor of such fulfillment. If, in considering this proposition of law, the question of what relation may have been created between the bank and the maker in case of a certification in the absence of funds is eliminated as a factor, the correctness of our reasoning is in our judgment conclusive. The insolvency of the certifying bank after the certification is a circumstance which is likely to disturb our judgment of the legal question, because it occasioned this suit. That fact is entirely immaterial to the question, the rights of the parties having been fixed before that insolvency was known, and they were utterly ignorant of its possibility. Our conclusion is, therefore, that the general rule applies to this case and discharges the drawer as well as the indorsers, notwithstanding the absence of funds.

Upon the undisputed facts in this case the defendants were entitled, as a matter of law, to an instructed verdict in their favor. The court was in error in not granting their request to that effect.

The judgment is reversed and a new trial ordered. All concur. \*

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\* This case is reported with notes on the effect of certification of check on the liability of drawer or indorser in 9 L. N. S. 698, 118 Am. St. Rep. 537, and in 11 A. & E. Ann. Cas. 241. — C.

4. DRAWEE NOT LIABLE TO HOLDER: A CHECK IS NOT AN ASSIGNMENT OF FUNDS.

§ 325 BANK OF THE REPUBLIC *v.* MILLARD.

10 WALLACE (U. S.) 152. — 1869.

IN ERROR to the Supreme Court of the District of Columbia, the case being this: —

Millard, a captain in the military service of the United States, was in 1865, on leaving the service, a creditor of the government for \$859, arrears of pay as captain. In settlement of this account the proper paymaster of the army drew and issued a check for that sum upon the National Bank of the Republic, a depository of public money and financial agent of the United States, for the custody, transfer, and disbursement of the government funds, having funds for the payment of the check.

The bank, as testimony tended to show, had once paid the check on a forged indorsement of Millard's name. Ascertaining and exposing the forgery, and recovering possession of the check, Millard now presented the same, demanding payment to himself. This payment the bank refused to make. Thereupon he sued it, declaring on a special count on the transaction, and also on a general count for money had and received by the bank to his use.

On the trial the bank requested the court to charge, "that unless the jury were satisfied from the evidence that it *accepted* the check in favor of the plaintiff, or his assignees, or promised to pay the same to the plaintiff, or his assignees, he was not entitled to recover." But the court refused so to charge, and, verdict and judgment having gone against the bank, it brought the case here on error; the questions here argued and considered being: 1st. The general one, — whether the holder of a bank check could sue the bank for refusing payment in the absence of proof that it was accepted by the bank or charged against the drawer. 2d. If not, whether the fact existing in this particular case, that the check was on a national bank (a public depository of the government funds) by an officer of the government, in favor of a public creditor, varied the general rule.

MR. JUSTICE DAVIS delivered the opinion of the court.

The only question presented by the record which it is material to notice is this: Can the holder of a bank check sue the bank for refusing payment, in the absence of proof that it was accepted by the bank, or charged against the drawer?

It is no longer an open question in this court, since the decision in the cases of *The Marine Bank v. The Fulton Bank* (2 Wallace, 252), and of *Thompson v. Riggs* (5 Id. 663), that the relation of

banker and customer, in their pecuniary dealings, is that of debtor and creditor. It is an important part of the business of banking to receive deposits, but when they are received, unless there are stipulations to the contrary, they belong to the bank, become part of its general funds, and can be loaned by it as other money. The banker is accountable for the deposits which he receives as a debtor, and he agrees to discharge these debts by honoring the checks which the depositors shall from time to time draw on him. The contract between the parties is purely a legal one, and has nothing of the nature of a trust in it. This subject was fully discussed by Lords Cottenham, Brougham, Lyndhurst, and Campbell, in the House of Lords, in the case of *Foley v. Hill* (2 Clark and Finnelly, 28), and they all concurred in the opinion that the relation between a banker and customer, who pays money into the bank, or to whose credit money is placed there, is the ordinary relation of debtor and creditor, and does not partake of a fiduciary character, and the great weight of American authority is to the same effect.

As checks on bankers are in constant use, and have been adopted by the commercial world generally as a substitute for other modes of payment, it is important, for the security of all parties concerned, that there should be no mistake about the status, which the holder of a check sustains towards the bank on which it is drawn. It is very clear that he can sue the drawer if payment is refused, but can he also, in such a state of case, sue the bank? It is conceded that the depositor can bring assumpsit for the breach of the contract to honor his checks, and if the holder has a similar right, then the anomaly is presented of a right of action upon one promise, for the same thing, existing in two distinct persons, at the same time. On principle, there can be no foundation for an action on the part of the holder, unless there is a privity of contract between him and the bank. How can there be such a privity when the bank owes no duty and is under no obligation to the holder? The holder takes the check on the credit of the drawer in the belief that he has funds to meet it, but in no sense can the bank be said to be connected with the transaction. If it were true that there was a privity of contract between the banker and holder when the check was given, the bank would be obliged to pay the check, although the drawer, before it was presented, had countermanded it, and although other checks, drawn after it was issued, but before payment of it was demanded, had exhausted the funds of the depositor. If such a result should follow the giving of checks, it is easy to see that bankers would be compelled to abandon altogether the business of keeping deposit accounts for their customers. If, then, the bank did not contract with the holder of the check to pay it at the time it was given, how can it be said that it owes any duty to the holder until the check is



presented and accepted? The right of the depositor, as was said by an eminent judge (Gardiner, J., *Chapman v. White*, 2 Selden, 417), is a chose in action, and his check does not transfer the debt, or give a lien upon it to a third person without the assent of the depository. This is a well established principle of law, and is sustained by the English and American decisions. (*Chapman v. White*, 2 Selden, 412; *Butterworth v. Peck*, 5 Bosworth, 341; *Ballard v. Randall*, 1 Gray, 605; *Harker v. Anderson*, 21 Wendell, 373; *Dykers v. Leather Manufacturing Co.*, 11 Paige, 616; *National Bank v. Eliot Bank*, 5 American Law Register, 711; Parsons on Bills and Notes, edition of 1863, pp. 59, 60, 61, and notes; Parke, Baron, in argument in *Bellamy v. Majoribanks*, 8 English Law and Equity, 522, 523; *Wharton v. Walker*, 4 Barnwell & Cresswell, 163; *Warwick v. Rogers*, 5 Manning & Granger, 374; Byles on Bills, chapter "Check on a Banker;" Grant on Banking, London edition, 1856, 96.)

The few cases which assert a contrary doctrine, it would serve no useful purpose to review.

Testing the case at bar by these legal rules, it is apparent that the court below, after the plaintiff closed his case, should have instructed the jury, as requested by the defendant, that the plaintiff, on the evidence submitted by him, was not entitled to recover. The defendant did not accept the check for the plaintiff, nor promise him to pay it, but, on the contrary, refused to do so. If it were true, as the evidence tended to show, that the bank, before the check came to the plaintiff's hands, paid it on a forged indorsement of his signature, to a person not authorized to receive the money, it does not follow that the bank promised the plaintiff to pay the money again to him, on the presentation of the check by him for payment.

*It may be*, if it could be shown that the bank had charged the check on its books against the drawer, and settled with him on that basis, that the plaintiff could recover on the count for money had and received, on the ground that the rule *ex æquo et bono* would be applicable, as this bank, having assented to the order and communicated its assent to the paymaster, would be considered as holding the money thus appropriated for the plaintiff's use, and therefore, under an implied promise to him to pay it on demand.

It is hardly necessary to say, that the check in question having been drawn on a public depository, by an officer of the government, in favor of a public creditor, cannot change the rights of the parties to this suit. The check was commercial paper, and subject to the laws which govern such paper, and it can make no difference whether the parties to it are private persons or public agents. (*The United States v. Bank of Metropolis*, 15 Peters, 377.)

As soon as the deposit was made to the credit of Lawler as paymaster, the bank was authorized to deal with it as its own, and

became answerable to Lawler for the debt in the same manner that it would have been had the deposit been placed to his personal credit.

Judgment reversed and a *venire de novo* awarded.<sup>1</sup>

### § 325 VAN BUSKIRK v. STATE BANK OF ROCKY FORD.

35 COLORADO, 142. — 1905.

MR. JUSTICE CAMPBELL delivered the opinion of the court.

The parties are each doing a separate banking business in the same town. A check drawn on the appellant by one of its depositors was by the payee presented for payment to the appellee. Appellee telephoned to appellant asking if the check was good, and was informed that it was "good," or "all right." This was the extent of the information given, and there was no promise by appellant that it would accept or pay the check unless the information given is, in law, that promise. Appellee then paid the check upon the strength of the foregoing reply to its question, but otherwise would not have cashed it. A few minutes thereafter the drawer appeared before the drawee (appellant) and stopped payment, of which appellant immediately advised the appellee. Afterwards, and on the same day, when appellee presented the check, duly indorsed, to appellant for payment, the latter refused to pay it because it had been directed by its depositor not to do so, although at the time the drawer had and still has with appellant sufficient funds for such payment.

Thereupon this action was brought by appellee against appellant to recover the amount of the check, upon the ground that appellant had promised to pay it. The trial court submitted the case to the jury upon the theory that the cause of action stated in the complaint, setting up the foregoing facts, was based upon an implied parol

<sup>1</sup> Accord: *Northern Trust Co. v. Rogers*, 60 Minn. 208; *First N. B. v. Clark*, 134 N. Y. 368; *Covert v. Rhodes*, 48 Ohio St. 66; *Northumberland Bank v. McMichael*, 106 Pa. St. 460; 5 Am. & Eng. Encyc. L. (2nd ed.), p. 1061. Contra: *Munn v. Burch*, 25 Ill. 35; *Fonner v. Smith*, 31 Neb. 107; *Simmons v. Bank*, 41 So. Car. 177; *Gordon v. Muchler*, 34 La. Ann. 604; 2 Morse on Banks, §§ 490-538. While the presumption is that no assignment arises from the giving of a check, yet this is controlled by the actual intention of the parties. If it is agreed that the payee shall have an assignment of a fund or any portion of a fund, he is in the ordinary position of an assignee and may enforce his rights by appropriate action in law or equity. *Fourth Street Bank v. Yardley*, 165 U. S. 634; *Risley v. Phoenix Bank*, 83 N. Y. 318; *Coates v. First N. B.*, 91 N. Y. 26; *First N. B. v. Clark*, 134 N. Y. 368. — H.

[Accord: *Love v. Ardmore Stock Exchange*, 5 Ind. Terr. (U. S. Ct. App.) 202, reported with note in 5 A. & E. Ann. Cas. 183; *Clark v. Toronto Bank*, 72 Kan. 1, reported with notes in 2 L. N. S. 83, and in 115 Am. St. Rep. 173.

Contra: *Turner v. Hot Springs Nat. Bank*, 18 S. Dak. 498. — C.]

promise to pay. The verdict and judgment were for the plaintiff, and the defendant appeals.

The two chief points relied upon by defendant below (appellant here) are (1) that under our Negotiable Instruments Law passed in 1897 (Session Laws 1897, p. 210), an action will not lie in favor of the holder of a check against the drawee unless and until the same is accepted or certified by the drawee, which acceptance or certification must be in writing; and (2) that if a parol acceptance or promise to pay is binding, no such promise was established by the evidence.

1. The courts of England and America have often held that, at the common law, though many of the rules and principles applicable to bills of exchange apply to bank checks, the two kinds of instruments are not identical. Regardless of the common law rights of the parties under the facts of this case, we think there can be no doubt as to the correctness of appellant's leading contention that, under our Negotiable Instruments Law, the drawee of a check is not liable to the holder unless and until he accepts or promises to pay the same, and such assent to his liability must be in writing. Section 126<sup>2</sup> of our act defines a bill of exchange as "an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to order or to bearer." Section 185<sup>3</sup> reads: "A check is a bill of exchange drawn on a bank payable on demand. Except as herein otherwise provided, the provisions of this act applicable to a bill of exchange payable on demand apply to a check."

At the common law a bill of exchange payable on demand need not be presented for acceptance. Indeed, strictly speaking, there is no such thing as acceptance of a check in the ordinary sense of the term; yet by consent of the holder the drawee bank may enter into an engagement quite similar to that of acceptance by certifying the check to be good, instead of paying it. 2 Daniels on Negotiable Instruments (4th ed.), § 1601; sec. 143 of our act.<sup>4</sup> A check is a species of bill of exchange, viz., that particular kind of a bill which is drawn on a bank and payable on demand. Under our act it need not be presented for acceptance unless it contains an express stipulation to that effect. Sec. 143.

Before the passage of our Negotiable Instruments Law this court had ruled, in accordance with the weight of authority, that a right of action does not exist in favor of the holder of a check against the drawee bank where there has been by the latter no acceptance

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<sup>2</sup> N. Y., § 210. — C.

<sup>3</sup> N. Y., § 321. — C.

<sup>4</sup> N. Y., § 240. — C.

or promise to pay. *Colo. Nat. Bank v. Boettcher*, 5 Colo. 185; reaffirmed in *Boettcher v. Colo. Nat. Bank*, 15 Colo. 16. Our statute has expressly so enacted. Sec. 189.<sup>5</sup> The same cases at least tacitly recognized the doctrine that such acceptance or implied promise might, in the absence of a statute to the contrary, be proved by parol testimony, but this doctrine is abrogated by our statute as we proceed to show. According to this statute, though all bills of exchange are not checks, yet as a check is therein expressly said to be a bill of exchange drawn on a bank and payable on demand, every check is a bill, that is, it is a species of a bill. So that, though a check need not be presented for acceptance in order to render the parties thereto liable, still as the check itself does not operate as an assignment of any part of the fund to the credit of the drawer with the bank, and the drawee bank is not liable to the holder, unless and until it accepts or certifies the check (sec. 189), and as (sec. 185) except as in the act otherwise provided all of its provisions applicable to a bill of exchange payable on demand apply to a check, and as no contrary provision for the acceptance of or promise to pay a check has been made, the provision applicable to a bill of exchange that acceptance or certification when made must be in writing applies also to a check. There being no pretense in this case that the promise to pay or certification or acceptance of the check sued upon was in writing, the holder was not entitled to sue the bank upon it.

There are distinctions between an action on a bill or check as an accepted bill and one founded on a breach of promise to accept. *Boyce v. Edwards*, 4 Peters, 111; *Henrietta Nat. Bank v. State Nat. Bank*, 80 Tex. 648. But we do not consider that such distinctions are important here. This action was based upon a parol promise to pay the check. Acceptance of a bill at common law and under our statute is merely the signification by the drawee of his assent to the order of the drawer. The legal meaning of an acceptance is that the acceptor engages to pay the instrument according to the tenor of his acceptance. In other words, it is a promise to pay. Session Laws 1897, secs. 62, 132; 1 Daniels on Negotiable Instruments (4th ed.), § 475. This action is one by a holder of a check against the drawer based upon a parol promise of the latter to pay, and it cannot be maintained.

2. It is well to observe that this is not an action to recover money lost by the fraud or wrongdoing of another, and if such were the cause of action pleaded the evidence would not support it. The only claim made by plaintiff is that the information which the appellant gave in response to an inquiry was, in legal effect, a promise to pay the check when the same was presented for that purpose. There is no pretense that the information given was false; it is conceded

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<sup>5</sup> N. Y., § 325. — C.

that the answer to plaintiff's inquiry on which the promise rests was true; hence there is present here no element of an action *ex delicto*.

In thus disposing of the case upon the ground that a promise such as is here relied upon must be in writing, we are relieved of the necessity of considering whether the mere oral statement by the drawee bank that a check drawn upon it is "good" or "all right" gives rise to an action in favor of one who parts with money upon the faith of it.

The judgment should be reversed and the cause remanded, with instructions to the trial court to dismiss the action.

Reversed.

CHIEF JUSTICE GABBERT and Mr. JUSTICE STEELE concur.

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## 5. FORGED OR RAISED CHECKS: RECIPROCAL OBLIGATIONS OF BANK AND DEPOSITOR.

### § 326<sup>6</sup> CRITTEN *v.* CHEMICAL NATIONAL BANK.

171 NEW YORK, 219.—1902.

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, affirming a judgment in favor of plaintiff entered upon the report of a referee.

CULLEN, J. — The plaintiffs kept a large and active account with the defendant, and this action is to recover an alleged balance of a deposit due to them from the bank. The plaintiffs had in their employ a clerk named Davis. It was the duty of Davis to fill up the checks which it might be necessary for the plaintiffs to give in the course of business, to make corresponding entries in the stubs of the check book and present the checks so prepared to Mr. Critten, one of the plaintiffs, for signature, together with the bills in payment of which they were drawn. After signing a check Critten would place

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<sup>6</sup> This section was added to the New York Negotiable Instruments Law by Laws of 1904, ch. 287, and to the New Jersey Negotiable Instruments Law by Laws of 1908, ch. 215. Mr. Crawford criticizes its incorporation into the Negotiable Instruments Law. "It does not seem to be germane to the Negotiable Instruments Law, and would more properly have been enacted as an amendment to the Banking Law. If the statute is to be amended by adding provisions outside of its proper scope, it will soon become such a piece of patchwork, that there will be a demand for its repeal." *Craw. Neg. Inst. Law*, 3rd ed., p. 181. While *Critten v. Chemical National Bank*, reported herein, was decided prior to the enactment of this statutory provision, nevertheless the principles of law laid down in this case will doubtless be carefully considered when the question as to what is the proper construction of the statute comes before the New York courts. — C.

it and the bill in an envelope addressed to the proper party, seal the envelope and put it in the mailing drawer. During the period from September, 1897, to October, 1899, in twenty-four separate instances Davis abstracted one of the envelopes from the mailing drawer, opened it, obliterated by acids the name of the payee and the amount specified in the check, then made the check payable to cash and raised its amount, in the majority of cases, by the sum of \$100. He would draw the money on the check so altered from the defendant bank, pay the bill for which the check was drawn in cash and appropriate the excess. On one occasion Davis did not collect the altered check from the defendant, but deposited it to his own credit in another bank. When a check was presented to Critten for signature the number of dollars for which it was drawn would be cut in the check by a punching instrument. When Davis altered a check he would punch a new figure in front of those already appearing in the check. The checks so altered by Davis were charged to the account of the plaintiffs, which was balanced every two months and the vouchers returned to them from the bank. To Davis himself the plaintiffs, as a rule, intrusted the verification of the bank balance. This work having in the absence of Davis been committed to another person, the forgeries were discovered and Davis was arrested and punished. It is the amount of these forged checks, over and above the sums for which they were originally drawn, that this action is brought to recover. The defendant pleaded payment and charged negligence on plaintiff's part, both in the manner in which the checks were drawn and in the failure to discover the forgeries when the pass book was balanced and the vouchers surrendered. On the trial the alteration of the checks by Davis was established beyond contradiction and the substantial issue litigated was that of the plaintiffs' negligence. The referee rendered a short decision in favor of the plaintiffs in which he states as the ground of his decision that the plaintiffs were not negligent either (1) in signing the checks as drawn by Davis, or (2) in failing to discover the forgeries at an earlier date than that at which they were made known to them.

The relation existing between a bank and a depositor being that of debtor and creditor, the bank can justify a payment on the depositor's account only upon the actual direction of the depositor. "The questions arising on such paper (checks) between drawee and drawer, however, always relate to what the one has authorized the other to do. They are not questions of negligence or of liability of parties upon commercial paper, but are those of authority solely. \* \* \* The question of negligence cannot arise unless the depositor has in drawing his check left blanks unfilled, or by some affirmative act of negligence has facilitated the commission of a fraud by those into whose hands the check may come." (*Crawford v. West Side Bank*, 100 N. Y. 50.) Therefore, when the fraudulent altera-

tion of the checks was proved, the liability of the bank for their amount was made out and it was incumbent upon the defendant to establish affirmatively negligence on the plaintiffs' part to relieve it from the consequences of its fault or misfortune in paying forged orders. Now, while the drawer of a check may be liable where he draws the instrument in such an incomplete state as to facilitate or invite fraudulent alterations,\* it is not the law that he is bound so to prepare the check that nobody else can successfully tamper with it. (*Société Générale v. Metropolitan Bank*, 27 L. T. [N. S.] 849; *Belknap v. National Bank of North America*, 100 Mass. 380.) In the present case the fraudulent alteration of the checks was not merely in the perforation of the additional figure, but in the obliteration of the written name of the payee and the substitution therefor of the word "cash." Against this latter change of the instrument the plaintiffs could not have been expected to guard, and without that alteration it would have no way profited the criminal to raise the amount. Apart, however, from that consideration, the question was clearly one of fact to be determined largely by an inspection of the checks themselves. They are not produced before us, and we cannot say that the finding of the referee, that the plaintiff was guilty of no negligence in signing them in the condition in which they were presented for signature, was without sufficient evidence for its support.

We are now brought to the consideration of the finding of the referee that the plaintiffs were not guilty of negligence in failing to discover the forgeries after the return of the checks and the balancing of the account in the pass book. Preliminarily we must determine what duty the depositor owes to his bank by way of examination and verification of his checks and account, for the learned counsel for the respondent asserts that no such duty in reality exists. This contention is principally based on the authority of *Weisser's Adm'rs v. Denison* (10 N. Y. 68). In that case a depositor sued his bank for the amount of certain checks to which his signature was forged by his clerk. His pass book was balanced and vouchers returned at intervals as in the present case. At the trial he recovered a verdict for the full amount of the forgeries. On appeal the General Term of the Superior Court ordered a reversal of the judgment unless the plaintiff would reduce his recovery to the amount paid on the forged checks prior to the time when the bank book was first balanced and vouchers returned. To this reduction the plaintiff assented, and, on the defendant's appeal, the judgment as modified was affirmed by this court. In the opinions delivered by two distinguished judges the doctrine is asserted that the depositor owes no duty to the bank to

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\* But see *National Exchange Bank v. Lester*, 194 N. Y. 461, reported herein at p. 616. — C.

examine his pass book or vouchers with the view to the detection of forgeries, but the decision itself is not authority for more than the proposition that the bank was not relieved from liability for forged checks which it had paid before the account was balanced by the failure of the depositor to subsequently discover the forgeries. As was said by Judge Johnson as to these checks, "Whatever loss the bank has sustained, it has suffered from its own negligence or want of skill in a matter as to which, in the first instance, it and it only was bound to exercise skill and diligence. To this loss no act of Weisser has contributed." The question again came before this court in the case of *Frank v. Chemical National Bank of New York* (84 N. Y. 209). That action was also brought to recover the amount of a series of checks forged by the depositor's clerk. A recovery by the plaintiffs was upheld, though not on the principle that the depositor owed no duty to his bank, but on the ground that he had discharged that duty. In the opinion there delivered, Judge Andrews said: "It does not seem to be unreasonable, in view of the course of business and the custom of banks to surrender its vouchers on the periodical writing up of the accounts of depositors, to exact from the latter some attention to the account when it is made up or to hold that the negligent omission of all examination may, when injury has resulted to the bank, which it would not have suffered if such examination had been made and the bank had received timely notice of objections, preclude the depositor from afterward questioning its correctness. But where forged checks have been paid and charged in the account and returned to the depositor, he is under no duty to the bank so to conduct the examination that it will necessarily lead to the discovery of the fraud. If he examines the vouchers personally and is himself deceived by the skillful character of the forgery, his omission to discover will not shift upon him the loss which in the first instance is the loss of the bank." In that case the depositor compared the returned checks with the stubs in the check book, but was deceived by the fact that the forger had abstracted the forged checks from the package. In the Supreme Court of the United States and in several of our sister states the rule is settled that the depositor owes his bank the duty of a reasonable verification of the returned checks. In *Leather Manufacturers' Bank v. Morgan* (117 U. S. 96) it was held that a depositor is bound personally or by his agent, and with due diligence, to examine the pass book and vouchers, and to report to the bank without unreasonable delay any errors which may have been discovered therein, and that if he fails to do so and the bank is thereby misled to its prejudice, he cannot afterwards dispute the correctness of the balance shown in the pass book. In *Dana v. National Bank of the Republic* (132 Mass. 156) the Supreme Court of Massachusetts said: "The mistake was in the payment of the money upon an altered check, believed to be genuine;



it was not for the advantage of the defendant, and its condition was changed by it. It was in the course of dealings between the parties in relation to which each owed duties to the other. \* \* \* The plaintiffs (depositors) owed to the defendant (bank) the duty of exercising due diligence to give it information that the payment was unauthorized; and this included not only due diligence in giving notice after knowledge of the forgery, but also due diligence in discovering it." In *Myers v. Southwestern National Bank* (193 Penn. St. 1) it was held that the bank was entitled to have the vouchers which it surrendered with the pass book examined, and if rejected returned within a reasonable time, and that if this was not done because of the depositor's failure to perform his duty in that regard he should not be permitted to recover. The same rule of law obtains in Louisiana (*De Fariet v. Bank of America*, 23 La. Ann. 310), in Texas (*Weinstein v. National Bank*, 69 Tex. 38), and in Alabama (*National Bank v. Allen*, 100 Ala. 476). The course of dealings between banks and their depositors is well known and is considered at length in the three cases first cited from other jurisdictions. The methods of depositors in drawing checks on their accounts have become much more uniform than at the time of the decision in *Weisser v. Denison*, *supra*. The practice of taking checks from check books and entering on the stubs left in the book the date, amount and name of the payee of the check issued has become general, not only with large commercial houses but with almost all classes of depositors in banks. The skill of the criminal has kept pace with the advance in honest arts and a forgery may be made so skillfully as to deceive not only the bank but the drawer of the check as to the genuineness of his own signature. But when a depositor has in his possession a record of the checks he has given, with dates, payees and amounts, a comparison of the returned checks with that record will necessarily expose forgeries or alterations. It is true that it will give no information as to the genuine character of the indorsements, and because the depositor has no greater knowledge on that subject than the bank, it owes the bank no duty in regard thereto. (*Welsh v. German-American Bank*, 73 N. Y. 424; *Shipman v. Bank of the State of New York*, 126 N. Y. 318.) It is also true that verification of the returned checks would not prevent a loss by the bank in the case of the payment of a single forged check and probably not in many cases enable the bank to obtain a restitution of its lost money. It would, however, prevent the successful commission of continuous frauds by exposing the first forgeries. That this is a numerous class of frauds is apparent from the number of cases which we have cited, in all of which the forgery was not a single act, but a series of acts extending over a considerable period of time, and the crime was committed by a clerk or employee of the depositor. Considering that the only certain test of the genuineness of the paid check may be the record made by the

depositor of the checks he has issued, it is not too much, in justice and fairness to the bank, to require of him, when he has such a record, to exercise reasonable care to verify the vouchers by that record.

While we hold that this duty rests upon the depositor, we are not disposed to accept the doctrine asserted in some of the cases that by negligence in its discharge or by failure to discover and notify the bank, the depositor either adopts the checks as genuine and ratifies their payment or estops himself from asserting that they are forgeries. Such a doctrine would be in conflict not only with the opinions rendered in *Weisser v. Denison*, *supra*, but against the decision there actually made. That authority has stood for nearly fifty years and we would not feel justified in now overruling it. Nor, if the question were an open one in this state, would we deem the rule of estoppel or that of ratification a just one. If the depositor has by his negligence in failing to detect forgeries in his checks and give notice thereof caused loss to his bank, either by enabling the forger to repeat his fraud or by depriving the bank of an opportunity to obtain restitution, he should be responsible for the damage caused by his default, but beyond this his liability should not extend. In the cases cited from the Supreme Court of the United States, from that of Massachusetts and that of Pennsylvania, it is conceded that, if the bank has been guilty of negligence in paying the forged checks, then the doctrine of ratification and estoppel does not apply. It seems to us that the exception is somewhat inconsistent with the principle on which the doctrine rests. Moreover, we see no reason why the bank should be entitled to anything more than indemnity for the loss the depositor's negligence has caused it. In the present case, a check altered by Davis from the sum of \$22 to \$622 was paid by the defendant to the Colonial Bank, in which Davis had deposited it. Against that bank the defendant has ample recourse. If it were to be held that the plaintiffs were estopped from denying the genuineness of that check as against the defendant, the latter could have no claim against the Colonial Bank, nor is it clear that the plaintiffs would have any direct right of action against that bank. The Colonial Bank took the check solely on the responsibility of Davis. To it the plaintiffs owed no duty. If the plaintiffs and the defendant had never settled their accounts the Colonial Bank could have had no complaint against either party for that cause. A rule which might operate to relieve that bank from the liability it assumed when it collected an altered check merely because the plaintiffs failed in their duty, not to it, but to a third party, should not be upheld. Nor would it operate justly in a case in which the bank had paid a single forgery unless by the depositor's default and delay the bank had lost its opportunity to secure restitution. This question is well discussed by the Supreme Court of Alabama in the case of *National Bank v.*

*Allen, supra*, and we concur in the view expressed by that court that the liability of the depositor for neglect of his duty to examine and verify his account with the bank is limited to the damages sustained by the bank in consequence of such neglect.

In the present case Davis falsified the additions or totals at the foot of the pages of the check book. But with a few exceptions he did not alter the amounts expressed in the stubs. In no case did he change in the stubs the name of the payee of the check. It is clear, therefore, that at all times a comparison of the returned checks with the stubs in the check books would have exposed the alterations made in the checks. Of course, the knowledge of the forgeries that Davis possessed, from the fact that he himself was the forger, was in no respect to be attributed to the plaintiffs. But we see no reason why they were not chargeable with such information as a comparison of the checks with the check book would have imparted to an innocent party previously unaware of the forgeries. The plaintiffs' position may be no worse because they intrusted the examination to Davis instead of to a third person; but they can be no better off on that account. If they would have been chargeable with the negligence or failure of another clerk in the verification of the accounts, they must be equally so for the default of Davis, so far as the examination itself would have disclosed the facts. We think it plain, therefore, that the finding of the referee that the plaintiffs were not negligent in the examination of the pass book and vouchers is without evidence to sustain it, unless the plaintiffs discharged their duty to the defendant when they committed the examination to a proper clerk and were not responsible for the manner in which the clerk performed the task. From the language of the report of the learned referee it would seem as if this last were the theory on which his decision proceeded. We do not think it can be sustained. If any duty rested on the plaintiffs we do not see why the ordinary rule of principal and agent or master and servant, that the principal or master is liable for the fault of his servant or agent in the master's business, did not apply. This was so held in the case of *Leather Manufacturers' Bank v. Morgan, supra*, and nothing to the contrary is to be found in *Frank v. Chemical National Bank of New York, supra*. There it is said: "The alleged duty, at most, only requires the depositor to use ordinary care; and if this is exercised, whether by himself or his agents, the bank cannot justly complain, although the forgeries are not discovered until it is too late to retrieve its position or make reclamation from the forger." In that case, however, the question of the liability of the principal for the negligence of his clerk did not arise, for the plaintiff made the examination personally. There are exceptions to the general rule of the liability of the master for his employee. But this case does not fall within those exceptions nor within the principle on which those exceptions are based.

These views would render it necessary to reverse the judgment appealed from except for another fact now to be noted. The referee's report is in the form of a short decision and on appeal it is to be presumed that all facts warranted by the evidence and necessary to support the judgment have been found. (*Amherst College v. Ritch*, 151 N. Y. 282; *Bartlett v. Goodrich*, 153 N. Y. 421; *Marden v. Dorothy*, 160 N. Y. 39.) The sixth in sequence of these forgeries was a check of June 20th, 1898, for \$12.49, altered to the sum of \$112.49, with the name of the payee erased and "Cash" written in the place thereof. The teller of the defendant, who paid the check and was a witness on its behalf, testified that the check showed on its face that the word "Cash" had been written in the place of the payee's name over an erasure; that the number of dollars was also written over an erasure; that he did not like the appearance of the check and that it was in such a mutilated condition when it was presented to him that, before paying it, he required Davis to indorse upon the check a receipt for its amount. That the defendant was grossly negligent in paying the check and has only itself to thank for that loss is apparent. But the effect of that negligence did not cease with the payment of the check. The referee might well have found that, had payment of the check been refused or had Davis been required to obtain the indorsement or guaranty of the plaintiffs as to its correctness, the forgeries of Davis would have been exposed and their repetition would not have occurred. That Davis was able to successfully continue from this time to his arrest a series of forgeries is as fairly attributable to the folly of the bank in paying to a clerk a check of his employers which had plainly been altered without making inquiry as to the reason or authority for the alteration, as it was to any carelessness of the plaintiffs in failing to detect the alteration when the checks were returned to them from the bank. Since we have held that the question in the case was not one of ratification or estoppel, but that the liability of the plaintiffs to the bank was solely for the loss caused by their negligence, it is a complete answer to the defendant's claim that its own negligence contributed to the loss. The learned counsel for the appellant contends that the plaintiffs' cause of action is not based on negligence and that the plaintiffs cannot sue on contract and recover in tort. This claim is without force. The action unquestionably was brought on contract, but it remains such. The plaintiffs sue for a debt to which the defendant answers: We have paid the money, true, not according to your directions, but in compliance with what we believed to be your directions, and your negligent conduct in your duty towards us led us into that error. To which the plaintiffs rejoin: Your own negligence contributed to the loss. All this may be true, yet the plaintiffs recover not in tort but on contract, for the allegation of negligence on the part of the defendant is used only to defeat its claim for relief on account of the plaintiffs' negligence.

It follows that under the authority of *Weisser v. Denison* (*supra*) the defendant is not entitled to credit for the two checks paid by it before the account was balanced and vouchers returned. For the third, fourth and fifth checks, amounting to \$300, it is entitled to credit, unless it was guilty of negligence in their payment, a fact which is neither found by the referee nor established by the evidence. For the sixth check and the subsequent ones it is not entitled to credit because of its negligence in paying the sixth check.

The judgment should be reversed and a new trial granted, costs to abide the event, unless the plaintiffs consent to deduct from their recovery the sum of \$300 with interest from November 15th, 1899, in which case the judgment, as modified, should be affirmed, without costs of this appeal to either party.

VANN, J. (dissenting). Whether the plaintiffs exercised reasonable care in examining the checks returned as vouchers by the defendant was a question of fact, and, as they intrusted the work to a competent agent and took other precautions, there was evidence to support the finding in their favor, which, after affirmance by the Appellate Division, is conclusive here. (*Amherst College v. Ritch*, 151 N. Y. 282.)

In my opinion the judgment below should neither be reversed nor modified, unless the court reaches the conclusion that the plaintiffs had constructive notice of what their agent discovered in examining the checks. The rule which imputes to a principal knowledge acquired by his agent rests upon the presumption that the latter has disclosed all the material facts to the former. This presumption does not extend to a fact which, if disclosed, would subject the agent to a prosecution for crime or defeat a scheme in which he was engaged to defraud his employer. (*Henry v. Allen*, 151 N. Y. 1, 9; *Benedict v. Arnoux*, 154 N. Y. 715, 728; *Bienenstok v. Ammidown*, 155 N. Y. 47, 60; *Pomeroy on Eq. Jur.* § 675.) The dishonesty of the agent changes the situation, for the necessity of concealing his dishonest acts, in order to prevent exposure and punishment, destroys the presumption which would otherwise prevail that he had made the facts known to his principal. A presumption must be reasonable or it cannot exist, and it would not be reasonable to expect one engaged in executing a fraudulent project to make a disclosure which would not only defeat his purpose but would send him to prison. Knowledge is not imputable when the agent is acting in hostility to his principal, or is engaged in perpetrating or concealing a fraud.

In this case the agent committed the furtive acts and knew all about them long before he examined the vouchers returned by the bank. He discovered no fraud while making that examination, for he knew all before, and could not discover what he already knew. He found out nothing while acting as agent, but only while acting on

his own account. He was still engaged in his scheme to defraud when he made the examination, and concealment was as necessary then as it had ever been. In concealing the fraud he did not act as agent, and he was engaged in concealing the fraud all the time after he began to carry on his system of forgery, and was so engaged when he examined the checks. In *Frank v. Chemical Nat. Bank* (84 N. Y. 209) the court said: "It was only because Goodheim was the criminal that the examination did not disclose to them the forgeries. He was not the plaintiffs' agent in issuing the forged paper, nor was he their agent in abstracting the false vouchers and falsifying the books, which was done in aid of his criminal purpose." If Goodheim, whose duty it was to examine the vouchers, discovered nothing imputable to the plaintiffs in that case, how could Davis, in examining the checks, make a discovery binding upon the plaintiffs in this case? Goodheim abstracted the false vouchers, so that the examination made by himself and the depositor would disclose no wrong, except by their absence, and Davis, whose duty it was to use the check punch, so used it as to leave sufficient space next to the dollar sign in which to subsequently cut a figure and thus raise the amount of the check. He also changed the footings at the bottom of the stub page of the check book so as to prepare for the examination. If what Goodheim did was not binding on his principal, how can we say that what Davis did was binding on the plaintiffs? In neither case can the duties of the dishonest agent be so separated as to distinguish the fraud in concealing the forgery from the forgery itself, for each act was part of a single scheme. The forgery, the preparation for concealment and the constant concealment were successive steps in the same transaction. It cannot be held that what Davis would have discovered if he had not been the forger but somebody else, is imputable to the plaintiffs without also imputing to them knowledge of the space left to punch out another figure, as well as of the false footings, for these acts were within the scope of his employment as much as the examination of the vouchers. In every case of successful fraud by an agent, it is the nature of the duties intrusted to him that enables him to perpetrate the fraud, and it is erroneous reasoning to say that if a part of those duties had been intrusted to another clerk, as he would have found out the facts, they must be imputed to the principal, because the latter in good faith assigned such duties to the criminal.

Under the circumstances, it cannot be presumed that Davis disclosed facts which an honest agent might have discovered in looking over the checks, but which the former knew before the checks came to his hands for examination, without subverting the reason upon which the rule of imputed knowledge is founded. Entertaining these views, I am compelled to dissent from those expressed in the prevailing

opinion, so far as they are inconsistent with this memorandum, and to vote in favor of affirmance.

PARKER, Ch. J., HAIGHT and WERNER, JJ., concur with CULLEN, J.; MARTIN, J., concurs with VANN, J.; BARTLETT, J., takes no part. Judgment accordingly.<sup>7</sup>

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<sup>7</sup> See long note to this case in 2 Col. Law Rev. 490 (November, 1902).

See *First National Bank of Richmond v. Richmond Electric Co.*, 106 Va. 347. This case is reported in 7 L. N. S. 744, with case note entitled, "Depositor's right to recover amount of forged or raised checks paid by bank as affected by the fact that he intrusted the examination of vouchers to the employee who was guilty of the original fraud." This note contains the following careful and instructive analysis of the authorities:

"Assuming that the depositor owes to the bank, and not merely to himself, the duty of verifying the account, and examining the vouchers returned by the bank, there are a number of different views . . . affecting the ultimate question whether the depositor is estopped as against the bank by intrusting that duty to the dishonest employee. These views may be formulated as follows:

"(1) That, while the depositor is not in the first instance chargeable with the dishonest employee's knowledge of his own fraud in raising or forging the check, yet, by intrusting the verification of the account and the examination of the vouchers to that employee, he becomes chargeable with the latter's antecedent knowledge. . . . [Citing, as in general support of this view, *First Nat. Bank v. Richmond El. Co.*, 106 Va. 347, and *First Nat. Bank v. Allen*, 100 Ala. 476; as repudiating it, *Kenneth Invest. Co. v. National Bank*, 103 Mo. App. 613.]

"(2) That the effect of intrusting the verification of the account and the examination of the vouchers to the dishonest employee is the same as if no verification or examination had been made at all. . . . [Citing *August v. Fourth Nat. Bank*, 15 N. Y. Supp. 139; and see view presented by the counsel for the bank in the case of *Kenneth Invest. Co. v. Nat. Bank*, *supra*, in his request to charge.]

"(3) That the duty resting upon the depositor to verify the account and examine the vouchers is not a personal one, but may be delegated to a competent employee; and that the fraud, negligence or omission of such employee is not imputable to the depositor. In this view, the depositor is exonerated, if he has good reason to believe, and did believe, that the employee in question was honest and competent. . . . [Citing as sustaining this view, *Kenneth Invest. Co. v. Nat. Bank*, *supra*; *Wachsmann v. Columbia Bank*, 8 Misc. (N. Y.) 280; and *Clark v. Nat. Shoe & Leather Bank*, 23 App. Div. 316 (obiter), *aff'd* in 164 N. Y. 504; and as at least impliedly supporting it, *Frank v. Chem. Nat. Bank*, 84 N. Y. 209.]

"(4) That the depositor who intrusts the verification of the account and the examination of the vouchers to the fraudulent employee, if in no worse, is at least in no better, position than if such duty had been intrusted to an honest and competent employee. This view assumes that the negligence or omission of such an employee would be imputable to the depositor; . . . In this view, it is apparent that the rights of the parties are made to turn upon the question whether an honest and competent employee, not having previous knowledge of the forgeries or other fraud, would, by the exercise of reasonable care, have discovered the same by his examination of the vouchers.

[Citing, as sustaining this view, *Gritten v. Chemical Nat. Bank*, 171

## § 326 McNEELY COMPANY v. BANK OF NORTH AMERICA.

221 PENNSYLVANIA, 588. — 1908.

ACTION by plaintiff against defendant bank to recover the amount of checks alleged to have been wrongfully paid by the bank. From an order dismissing exceptions to the report of the referee in favor of the defendant, plaintiff appeals.

BROWN, J. McNeely Company, a corporation, was a depositor with the appellee, the Bank of North America, and had in its employ one Charles S. Reber, who between April 20, 1897, and February 24, 1903, forged the names of payees on 90 checks issued by it. \* \* \* The fact that Reber had forged some of the indorsements was, as stated, discovered about January 1, 1904, and within two or three weeks thereafter it was known to the appellant that a very large number of the 90 forgeries had been committed; but no notice of this was given to the bank until nearly three months afterwards.

The duty of a depositor in a bank, upon discovering that it has paid and charged to his account either a check bearing his forged signature as drawer or his check on the forged indorsement of the payee, is to promptly notify it of the forgery. This notification is not only a duty, but it is what a depositor will instinctively do on discovering, upon the return of his bank book with canceled checks charged to his account, that there are among them some which he never signed or which were not paid to the payees named in them. This duty is not questioned by the learned counsel for the appellant. Their contention is that, for the disregard of it, a depositor is not to be barred from recovering from the bank what it may have paid on his forged signatures or on the forged indorsements of payees named in checks drawn by him, unless, by his failure to promptly notify it of the forgeries, it has lost rights over against other parties, and the burden is upon it to prove such loss. Authorities are not wanting to support

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N. Y. 219, (the case to which this is a note); *Dana v. National Bank*, 132 Mass. 156; *Myers v. Southwestern Nat. Bank*, 193 Pa. 1.]

"(5) The fifth view varies but slightly from the fourth, and in practical cases it is with difficulty to be distinguished therefrom. It, however, makes the rights of the respective parties turn, not, as in the fourth view, upon the question whether an examination of the vouchers by an honest and competent employee would have disclosed the fraud, but upon the question whether a reasonable supervision by the depositor over the fraudulent employee in the discharge of the duty of examining the vouchers would have disclosed the forgeries. . . ." [Citing, as sustaining this view, *Leather Manuf. Nat. Bank v. Morgan*, 117 U. S. 96, and, as seeming to support it, *Hardy v. Chesapeake Bank*, 51 Md. 562.]

In general support of the fourth view above stated, see also the exhaustive and instructive discussion of this subject in *Nat. Dredging Co. v. Farmers' Bank*, 6 Pennewill (Del.), 580. See also the long note to this case in 7 Mich. Law Rev. 58 (November, 1908). — C.



this, but the referee and court below did not follow them. Relying upon others, they held that the plaintiff, by reason of its failure to promptly notify the bank of its discovery of the forgeries, could not recover, even though the bank had offered no evidence that it could have protected itself and the plaintiff had not shown that it could not if prompt notice had been given.

The relation between a bank and its depositor is a contractual one. Its undertaking with its depositor is to pay his checks, if he has sufficient funds with it for that purpose, and it assumes all the risk as against him of a mispayment in paying and charging to his account a check which he has not signed or one which he has signed bearing a forged indorsement of the payee. To his account it may not charge such a check. If it does, the depositor can recover from it the amount so charged. No payment by a bank on a forged signature of a depositor as drawer of a check or on a forged indorsement of his payee can affect him. His right is to get back from the bank whatever he has deposited with it, less what has been properly paid out on his orders. The responsibility of the bank to the depositor is absolute, and it can retain no money deposited with it by him to reimburse it for any mispayment it has made out of such deposit; but it can recover from a forger responsible for the mispayment, or from those who, by their indorsement of a check, have vouched for previous indorsements or the genuineness of the signature of the alleged drawer.

The right of a bank to recover from a forger, or from those to whom it may have paid a check bearing the forged signature of one of its depositors, or a forged indorsement, is its only remedy for the fraud practiced upon it by the forgery. The depositor's money is not affected by it, and, when he is the first to discover it, it is not reasonable that he should not be required to give prompt notice of it to the bank, if he intends to hold his depository liable for the mispayment, and this without regard to what may or may not result from a prompt effort to recover from the party or parties who may be liable to the bank for the mispayment. The depositor can gain nothing by withholding knowledge of the forgery, but the bank, if kept in ignorance of it after his discovery of it, may lose everything. As soon as a bank learns that it has paid a check on a forged signature of a depositor, or on a forged indorsement on his check, it is its duty to promptly restore to the depositor's account what was improperly taken from it, and its right at the same time is to proceed against those who wrongfully got the money. This right is to proceed immediately, and to the promptness with which a bank is able to exercise it recovery is often due. When a depositor withholds from his bank his knowledge of the forgery, he withholds from it this right to proceed promptly for its own protection. It may or may not be able to recover from the forger by promptly proceeding against

him, but its right is to try by so proceeding; and, when one of its depositors discovers that it has innocently sustained a loss, he ought, not only in all good conscience, but as a legal duty, to notify it at once of its mistake; for by withholding from it what he has discovered he can, as just stated, gain nothing, but it may lose all. A forger may be insolvent or beyond the reach of civil or criminal process, but, by prompt proceedings against him, others may become interested in him and come to his assistance, who after delay may not do so. This incident to a bank's right to promptly proceed against a forger is not to be overlooked. Whenever a depositor knowingly withholds from it knowledge without which it cannot so proceed in an effort to protect itself, he ought to be regarded, when he comes to enforce alleged rights against it, as having withheld from it a substantial right, without regard to what might or might not have resulted from a prompt exercise of that right. \* \* \*

Other questions raised by the appellant need not be considered in view of the correct conclusion of the court below that its delay in giving the appellee notice of the forgeries bars its right to recover.

The assignments of error are all overruled and the judgment is affirmed.<sup>9</sup>

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<sup>8</sup> In support of this position the court cites and discusses the following authorities: *Rick v. Kelly* and *Rick v. Fischer*, 30 Pa. 527; *Myers v. Southwestern Nat. Bank*, 193 Pa. 1; *United Sec. Life Ins. & Trust Co. of Pa. v. Central Nat. Bank*, 185 Pa. 586; and *Leather Manuf. Nat. Bank v. Morgan*, 117 U. S. 96. — C.

<sup>9</sup> This case is reported in 20 L. N. S. 79, with case note entitled, "Loss or prejudice to bank resulting from negligent failure on part of depositor or correspondent bank to give prompt notice of forgery, as a condition of its right to charge forged checks to latter's account." The note says that "It seems to be the general rule, contrary to that laid down in *McNeely v. Bank of North America*, that before a bank is justified in charging the amount paid on forged paper against the account of a depositor or correspondent bank, because of negligence in discovering or reporting the forgery, it must show that, because of such negligence, it was prejudiced, or lost an opportunity to protect itself by action against the forger or other third party": Citing *Janin v. London v. S. F. Bank*, 92 Cal. 14; *Brixen v. Deseret Nat. Bank*, 5 Utah, 504; *Third Nat. Bank v. Merchants' Nat. Bank*, 76 Hun, 475; *Harlem, etc. Ass'n v. Mercantile Trust Co.*, 10 Misc. (N. Y.) 680; *Wind v. Fifth Nat. Bank*, 39 Mo. App. 72; *Hardy v. Chesapeake Bank*, 51 Md. 562; *Murphy v. Met. Nat. Bank*, 191 Mass. 159; *Weinstein v. Nat. Bank*, 69 Tex. 38. — C.

## 6. LIABILITY OF DRAWEE TO DRAWER FOR WRONGFUL DISHONOR.

ATLANTIC NATIONAL BANK *v.* DAVIS.

96 GEORGIA, 334. — 1895.

ACTION for damages for dishonoring plaintiff's check. The check was for \$12.48. Plaintiff had on deposit in defendant bank over \$300. By a mistake of a clerk payment was refused. Defendant on discovering the mistake wrote plaintiff explaining the matter and also wrote the holder or holder's forwarding bank explaining the error and stating that plaintiff was one of defendant's best customers and had never drawn against his account without funds to his credit. Verdict for plaintiff for \$200. Defendant appeals.

LUMPKIN, JUSTICE. — 1. The plaintiff's check came by due course of mail to the defendant bank, upon which it was drawn, and in which he had on deposit at the time sufficient funds with which to pay it. The check was returned unpaid. It seems clear from the evidence that this was done, not deliberately or maliciously, but in consequence of a mistake made by one of the employees of the bank. The paper was not protested nor wilfully dishonored. Still, so far as the plaintiff is concerned, we think what occurred amounted to a refusal to pay his check. The consequences to him resulting from the inadvertence of the bank official were exactly the same as if there had been an express refusal to pay. We do not think a bank should be allowed to send out a paper with a badge of dishonor upon it, and then protect itself by saying, in effect, that this was caused simply by its own carelessness.

2. It was not denied that if the conduct of the bank amounted to a refusal to pay, it was liable in damages to the plaintiff; but the serious question was, as to what should be the measure of such damages.

There was no proof of any actual or special damage, and the defendant therefore insisted that, at most, the damages awarded should be only nominal. We have given the subject some investigation, and as a result, we find ourselves unable to accept this as a correct proposition of law. The following authorities are pertinent, and throw much light upon the question: —

In 2 Addison on Contract, § 820, the author, after stating the general rule that a banker is bound to honor the checks of his customers, if presented within banking hours and provided he has in hand sufficient funds for the purpose belonging to the customers, adds: "And if he refuses, he is liable to an action by the customer for substantial damages, without proof of actual damage; for it is a discredit to the customer to have his cheque refused payment." Again, in 2 Morse on Banks, § 458, after a statement of the general rule relat-

ing the bank's duty in the premises, we find the following: "This duty and this right are so far substantial, that if the bank refuses, without sufficient justification, to pay the check of the customer, the customer has his action for damages against the bank. It has been said that if in such action the customer does not show that he has suffered a tangible or measurable loss or injury from the refusal, he shall recover only nominal damages. But the better authority seems to be, that even if such actual loss or injury is not shown, yet more than nominal damages shall be given. It can hardly be possible that a customer's check can be wrongfully refused payment without some impeachment of his credit, which must in fact be an actual injury, though he cannot from the nature of the case furnish independent distinct proof thereof."

Accordingly, it would seem that the plaintiff's recovery is not to be limited to merely nominal damages. We find authority for saying that in such a case he should be awarded "temperate" damages. Thus, in *Birchall v. Third National Bank* (19 Cen. Law J. 390), it was ruled that a bank is liable in temperate damages to a customer for a wrongful dishonor of his check, without proof of special damages. In the notes appended to an article on "Damages for Wrongful Dishonor of Checks," following the report of the above cited case, will be found a large collection of authorities, which may be of help to any one desiring to further pursue an investigation into this question. Another authority for the allowance of "temperate" damages to a customer for wrongful dishonor of his check, although special damage is not shown, is Newmark on Special Bank Deposits, § 215; and the same rule is stated in 3 Am. and Eng. Enc. of Law, p. 226, under the title "Checks" (2d ed., vol. 5, pp. 1059-1060). In a note to the text, *Birchall's case*, *supra*, is cited.

3. In view of all the evidence disclosed by the record, we think the verdict for \$200 rendered in the present case was "temperate," and therefore sustainable.

Judgment affirmed.<sup>1</sup>

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<sup>1</sup> Accord: *Schaffner v. Ehrman*, 139 Ill. 109, where a judgment for \$450 for dishonoring a check for \$249 was upheld as reasonable; *Patterson v. Marine N. B.*, 130 Pa. St. 419, verdict for \$300 held reasonable. See also *Bank of Commerce v. Goos*, 39 Neb. 437. Where the depositor proceeds as for a breach of contract and not in tort it seems that in the absence of allegation and proof of special damages, he can recover only nominal damages. *Marzetti v. Williams*, 1 B. & Ad., 415; *Brooke v. Tradesmen's N. B.*, 69 Hun (N. Y.), 202; *Burroughs v. Tradesmen's N. B.*, 87 Hun (N. Y.), 6; *Citizens' N. B. v. Importers and Traders' Bank*, 119 N. Y. 195. — H.

[All the authorities agree that an action lies against a bank by a depositor for the wrongful dishonor by the former of the latter's check, and that the depositor by proving special loss is entitled to recover compensatory damages. But where the depositor does not allege and prove special damages, the courts disagree as to whether he should be entitled to substantial dam-

ages or be confined to nominal damages only. On this point see *Lorick v. Palmetto Bank*, 74 S. Car. 185, reported with note in 7 A. & E. Ann. Cas. 818; *Columbia Nat. Bank v. MacKnight*, 29 App. Cas. Dist. of Col. 580, reported with note in 10 A. & E. Ann. Cas. 897; and *Third Nat. Bank of St. Louis v. Ober*, 178 Fed. (C. C. A.) 678. See also *Hilton v. Jesup Banking Co.*, 128 Ga. 30, reported in 10 A. & E. Ann. Cas. 978, with note entitled "Admissibility in action by depositor for damages for wrongful dishonor of check, of evidence of depositor's financial standing and credit."

Some cases distinguish between an action brought by a merchant or trader, and one brought by a person who is not a merchant or trader. Thus, the court in *Third Nat. Bank of St. Louis v. Ober*, *supra*, said: "If the depositor is a merchant or trader, it will be presumed, without further proof, that substantial damages have been sustained. *Schaffner v. Ehrman*, 139 Ill. 109; *James Co. v. Bank*, 105 Tenn. 1; *Svensden v. Bank*, 64 Minn. 40. This rule proceeds upon the fact, commonly recognized, that the credit of a person engaged in such a calling is essential to the prosperity of his business, and the dishonoring of his checks is plainly calculated to impair it and to inflict a most serious injury. In common opinion, substantial damage is the natural and probable consequence of the act, and therefore a substantial recovery may be had, without pleading or proof of special damage. . . . On the other hand, if the depositor is not a merchant or trader, there is no such presumption of substantial injury, and his recovery should be a nominal one, unless he pleads and proves some special damage." But see *Col. Nat. Bank v. MacKnight*, *supra*, where the court said: "Although in this case the plaintiff was a physician, and not a trader, we think the jury should not have been confined to nominal damages only."

Some confusion has also arisen because of the failure to distinguish between the cases (1) where the depositor proceeds as for a breach of contract, and (2) where he proceeds in tort. For an excellent statement of the different considerations affecting the measure of damages in these two classes of cases, see *Davis v. Standard Nat. Bank*, 50 App. Div. (N. Y.) 210.

In *Callahan v. Bank of Anderson*, 69 S. Car. 374, it was held by an evenly divided court that where a depositor has deposited with a bank funds sufficient to meet payment of a check drawn by him in favor of a third party, he has a right of action against the bank for its refusal to pay such check in the absence of notice to him that the bank has applied the funds so deposited in extinguishment of past due claims held against him. See this case reported in 2 A. & E. Ann. Cas. 203, with note entitled, "Bank's lien or set-off against deposit for debt due it by depositor."—C.]

**PART II.**  
**STATUTES**

## THE NEGOTIABLE INSTRUMENTS LAW.

The Law has been enacted in the following states and territories:

ALABAMA. — Laws 1907, Chap. 722 (in effect January 1, 1908); Code 1907, Chap. 115, Secs. 4958-5149.

ARIZONA. — Rev. Stat. 1901, p. 852, title 49 of Civil Code, Secs. 3304-3491 (in effect September 1, 1901); Laws 1905, Chap. 23.

COLORADO. — Laws 1897, Chap. 64 (approved April 20, 1897); Rev. Stat. 1908, pp. 1104-1126, Secs. 4464-4659.

CONNECTICUT. — Laws 1897, Chap. 74 (approved Apr. 5, 1897); Genl. Stat. Rev. 1902, p. 1028.

DISTRICT OF COLUMBIA. — Laws U. S. 1899 (in effect Apr. 3, 1899); Laws U. S. 1901; Laws U. S. 1902, Secs. 1304-1493.

FLORIDA. — Laws 1897, Chap. 4524 (approved June 1, 1897); Genl. Stat. 1906, p. 1147; Secs. 2394-3099.

HAWAII. — Laws 1907, Act 89, p. 118 (approved Apr. 20, 1907).

IDAHO. — Laws 1903, p. 380 (in effect Mar. 10, 1903).

ILLINOIS. — Laws 1907, p. 403 (approved June 5, 1907).

IOWA. — Laws 1902, Chap. 130 (approved Apr. 12, 1902); Laws 1906, Chap. 149; Code Supp. 1902, p. 352, Chap. 3-A, Secs. 3060-a1-3060-a198.

KANSAS. — Laws 1905, Chap. 310 (in effect June 8, 1905); Genl. Stat. 1905, p. 967, Chap. 70, Secs. 4533-4732.

KENTUCKY. — Laws 1904, Chap. 102 (approved March 24, 1904).

LOUISIANA. — Laws 1904, Chap. 64 (approved June 29, 1904).

MARYLAND. — Laws 1898, Chap. 119 (approved March 29, 1898).

MASSACHUSETTS. — Laws 1898, Chap. 533 (in effect January 1, 1899); Laws 1899, Chap. 130; Rev. Laws 1902, p. 628, Chap. 73, Secs. 18-212; Laws 1910, Chap. 417.

MICHIGAN. — Laws 1905, Chap. 265 (approved June 16, 1905).

MISSOURI. — Laws 1905, p. 243 (approved Apr. 10, 1905); Laws 1907, p. 366.

MONTANA. — Laws 1903, Chap. 121 (in effect March 7, 1903).

NEBRASKA. — Laws 1905, Chap. 83 (in effect August 1, 1905); Comp. Stat. 1907, Chap. 41, Secs. 3558-a1-3558-a198.

NEVADA. — Laws 1907, Chap. 62 (in effect May 1, 1907).

NEW HAMPSHIRE. — Laws 1909, Chap. 123 (in effect January 1, 1910).

NEW JERSEY. — Laws 1902, Chap. 184 (approved April 4, 1902); Laws 1908, chap. 215.

NEW MEXICO. — Laws 1907, Chap. 83 (approved March 21, 1907).

NEW YORK. — Laws 1897, Chap. 612; (in effect October 1, 1897); Laws 1898, Chap. 336; Laws 1904, Chap. 287; Cons. Laws, 1909, Chap. 43.

NORTH CAROLINA. — Laws 1899, Chap. 733 (in effect March 8, 1899); Laws 1905, Chap. 327; Laws 1907, Chap. 807; Revisal, 1905, p. 655, Chap. 54, Secs. 2151-2346.

NORTH DAKOTA. — Laws 1899, Chap. 113 (approved March 7, 1899); Civil Code, 1905, p. 1002, Chap. 90, Secs. 6303-6498.

OHIO. — Laws 1902, p. 162 (in effect January 1, 1903); Bates' Annot. Stat. (5th ed.), pp. 1800a-1807, Secs. 3171-3178e.

OKLAHOMA. — Laws 1909, Chap. 24 (approved March 20, 1909); Comp. Laws, 1909, Chap. 69, p. 1044, Secs. 4435-4624.

OREGON. — Laws 1899, p. 18 (approved February 16, 1899); Ballinger & Cotton's Annot. Codes & Stat., p. 1440, Secs. 4403-4594.

PENNSYLVANIA. — Laws 1901, No. 162 (in effect September 2, 1901); Laws 1909, No. 169, p. 260.

RHODE ISLAND. — Laws 1899, Chap. 674 (in effect July 1, 1899); Gen. Laws 1909, p. 648, Chap. 200.

TENNESSEE. — Laws 1899, Chap. 94 (in effect May 16, 1899).

UTAH. — Laws 1899, Chap. 83 (in effect July 1, 1899).

VIRGINIA. — Laws 1898, Chap. 866 (approved March 3, 1898); Laws 1906; Chap. 219; Code, 1904, Chap. 133a, Sec. 2841a.

WASHINGTON. — Laws 1899, Chap. 149 (in effect March 22, 1899); Remington & Ballinger's Annot. Codes and Stat., Vol. 2, p. 120, Secs. 3392-3586.

WEST VIRGINIA. — Laws 1907, Chap. 81 (in effect January 1, 1908)

WISCONSIN. — Laws 1899, Chap. 356 (in effect May 15, 1899); Laws 1901, Chap. 41; Laws 1905, Chap. 262; Laws 1907, Chap. 361.

WYOMING. — Laws 1905, Chap. 43 (approved February 15, 1905); Comp. Stat. 1910, Chap. 210, Secs. 3159-3354.



### EXPLANATORY NOTE.

THE text is that of the New York Negotiable Instruments Law. The material in the notes in brackets is taken from the notes of the draftsman of the act (J. J. Crawford, Esq.), as they appeared in the draft printed by the Commissioners on Uniformity of Laws. The reference, "Pages x-x" is to the "Cases and Authorities" contained in Part I of this volume. The reference "Chalmers" is to Chalmers' Bills of Exchange Act (5th ed.), London, 1896. The reference to "Daniel" is to Daniel on Negotiable Instruments.

# THE NEGOTIABLE INSTRUMENTS LAW.

LAWS OF NEW YORK, 1909, CHAPTER 43.<sup>1</sup>

AN ACT in relation to negotiable instruments, constituting chapter thirty-eight of the consolidated laws.

Became a law February 17, 1909, with the approval of the Governor. Passed, three-fifths being present.

*The People of the State of New York, represented in Senate and Assembly, do enact as follows:*

## CHAPTER 38 OF THE CONSOLIDATED LAWS.

### NEGOTIABLE INSTRUMENTS LAW.

- ARTICLE I. SHORT TITLE; DEFINITIONS. (§§ 1, 2.)
- II. GENERAL PROVISIONS. (§§ 3-7.)
- III. FORM AND INTERPRETATION. (§§ 20-42.)
- IV. CONSIDERATION. (§§ 50-55.)
- V. NEGOTIATION. (§§ 60-80.)
- VI. RIGHTS OF HOLDER. (§§ 90-98.)
- VII. LIABILITIES OF PARTIES. (§§ 110-119.)
- VIII. PRESENTMENT FOR PAYMENT. (§§ 130-148.)
- IX. NOTICE OF DISHONOR. (§§ 160-189.)
- X. DISCHARGE. (§§ 200-206.)
- XI. BILLS OF EXCHANGE; FORM AND INTERPRETATION. (§§ 210-215.)
- XII. ACCEPTANCE. (§§ 220-230.)
- XIII. PRESENTMENT FOR ACCEPTANCE. (§§ 240-248.)
- XIV. PROTEST. (§§ 260-268.)
- XV. ACCEPTANCE FOR HONOR. (§§ 280-289.)
- XVI. PAYMENT FOR HONOR. (§§ 300-306.)
- XVII. BILLS IN SETS. (§§ 310-315.)
- XVIII. PROMISSORY NOTES AND CHECKS. (§§ 320-326.)
- XIX. NOTES GIVEN FOR PATENT RIGHTS AND FOR A SPECULATIVE CONSIDERATION. (§§ 330-332.)
- XX. LAWS REPEALED; WHEN TO TAKE EFFECT. (§§ 340-341.)

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<sup>1</sup> The uniform Negotiable Instruments Law was originally enacted in New York by L. 1897, c. 612. Certain errors, most of them manifest on the face of the act itself, were corrected by L. 1898, c. 336. When it was incorporated into the consolidated laws in 1909, sections 3 to 7 were made into a separate article, numbered 2, thus changing the original numbering of articles 2 to 19; a few additional errors were corrected, and a few verbal changes made. The existing act, however, is for all practical purposes the same as when it was originally enacted except for the addition of § 326 by L. 1904, c. 287. — C.

## ARTICLE I.

## SHORT TITLE: DEFINITIONS.

## SECTION 1. Short title.

## 2. Definitions.

## § 1. Short title.

This chapter shall be known as the "Negotiable Instruments Law."

## § 2. Definitions.

In this chapter, unless the context otherwise requires:

"Acceptance" means an acceptance completed by delivery or notification.

"Action" includes counter-claim and set-off.

"Bank" includes any person or association of persons carrying on the business of banking, whether incorporated or not.

"Bearer" means the person in possession of a bill or note which is payable to bearer.

"Bill" means bill of exchange, and "note" means negotiable promissory note.

"Delivery" means transfer of possession, actual or constructive, from one person to another.

"Holder" means the payee or indorsee of a bill or note, who is in possession of it, or the bearer thereof.<sup>2</sup>

"Indorsement" means an indorsement completed by delivery.

"Instrument" means negotiable instrument.

"Issue" means the first delivery of the instrument, complete in form, to a person who takes it as a holder.

"Person" includes a body of persons, whether incorporated or not.

"Value" means valuable consideration.

"Written" includes printed, and "writing" includes print.

See Bills of Exchange Act, section 2.

## ARTICLE II.

## GENERAL PROVISIONS.

## SECTION 3. Person primarily liable on instrument.

4. Reasonable time, what constitutes.

5. Time, how computed; when last day falls on holiday.

6. Application of chapter.

7. Law merchant; when governs.

**§ 3. Person primarily liable on instrument.**

The person "primarily" liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same. All other parties are "secondarily" liable.

**§ 4. Reasonable time, what constitutes.**

In determining what is a "reasonable time" or an "unreasonable time" regard is to be had to the nature of the instrument, the usage of trade or business (if any) with respect to such instruments, and the facts of the particular case.

See Bills of Exchange Act, sections 40, 45, 74, 86. See pages 484, 737.

**§ 5. Time, how computed; when last day falls on holiday.**

Where the day, or the last day, for doing any act herein required or permitted to be done falls on Sunday or on a holiday, the act may be done on the next succeeding secular or business day.

See § 145. See N. Y. General Construction Law, §§ 20, 30.

**§ 6. Application of chapter.**

The provisions of this chapter do not apply to negotiable instruments made and delivered prior to October first, eighteen hundred and ninety-seven.

**§ 7. Law merchant; when governs.**

In any case not provided for in this act the rules of the law merchant shall govern.

**ARTICLE III.****FORM AND INTERPRETATION.****SECTION 20. Form of negotiable instrument.**

21. Certainty as to sum; what constitutes.
22. When promise is unconditional.
23. Determinable future time; what constitutes.
24. Additional provisions not affecting negotiability.
25. Omissions; seal; particular money.
26. When payable on demand.
27. When payable to order.
28. When payable to bearer.
29. Terms when sufficient.
30. Date; presumption as to.
31. Ante-dated and post-dated.
32. When date may be inserted.
33. Blanks, when may be filled.
34. Incomplete instrument not delivered.
35. Delivery; when effectual; when presumed.
36. Construction where instrument is ambiguous.
37. Liability of person signing in trade or assumed name.
38. Signature by agent; authority; how shown.

- 39. Liability of person signing as agent.
- 40. Signature by procuration; effect of.
- 41. Effect of indorsement by infant or corporation.
- 42. Forged signature; effect of.

## § 20. Form of negotiable instrument.

An instrument to be negotiable must conform to the following requirements:

- 1. It must be in writing <sup>1</sup> and signed by the maker or drawer; <sup>2</sup>
- 2. Must contain an unconditional <sup>3</sup> promise <sup>4</sup> or order <sup>5</sup> to pay a sum certain <sup>6</sup> in money; <sup>7</sup>
- 3. Must be payable on demand <sup>8</sup> or at a fixed or determinable future time; <sup>9</sup>
- 4. Must be payable to order <sup>10</sup> or to bearer; <sup>11</sup> and
- 5. Where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty. <sup>12</sup>

[NOTE. — See Bills of Exchange Act, sections 3, 4, 5, 6.] For definition of bill, note, check, see §§ 210, 320, 321.

## § 21. Certainty as to sum; what constitutes.

The sum payable is a sum certain <sup>13</sup> within the meaning of this chapter, although it is to be paid:

- 1. With interest; <sup>14</sup> or
- 2. By stated installments; <sup>15</sup> or
- 3. By stated installments, with a provision that upon default in payment of any installment or of interest, the whole shall become due; <sup>16</sup> or
- 4. With exchange, whether at a fixed rate or at the current rate; <sup>17</sup> or
- 5. With costs of collection or an attorney's fee, in case payment shall not be made at maturity. <sup>18</sup>

[NOTE. — See Bills of Exchange Act, section 9.]

## § 22. When promise is unconditional.

An unqualified order or promise to pay is unconditional within the meaning of this chapter, though coupled with:

<sup>1</sup> See § 2. Pages 34-35.

<sup>2</sup> Pages 35-37.

<sup>3</sup> See § 22. Pages 46-61.

<sup>4</sup> Pages 37-44.

<sup>5</sup> Pages 44-45.

<sup>6</sup> See § 21. Pages 61-80.

<sup>7</sup> Pages 81-89.

<sup>8</sup> See § 26. Pages 96-97.

<sup>9</sup> See § 23. Pages 97-106.

<sup>10</sup> See § 27. Pages 107-122.

<sup>11</sup> See § 28. Pages 122-148.

<sup>12</sup> See § 210. Pages 148-150.

<sup>13</sup> Pages 61-64.

<sup>14</sup> Pages 64-67.

<sup>15</sup> Pages 67-72.

<sup>16</sup> Pages 72-74.

<sup>17</sup> Pages 74-78.

<sup>18</sup> Pages 78-80.

1. An indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount;<sup>19</sup> or

2. A statement of the transaction which gives rise to the instrument.<sup>20</sup>

But an order or promise to pay out of a particular fund is not unconditional.<sup>21</sup>

[NOTE. — See Bills of Exchange Act, section 3, subdivision 3.]

### § 23. Determinable future time; what constitutes.

An instrument is payable at a determinable future time, within the meaning of this chapter, which is expressed to be payable:

1. At a fixed period after date or sight;<sup>22</sup> or

2. On or before a fixed or determinable future time specified therein;<sup>23</sup> or

3. On or at a fixed period after the occurrence of a specified event, which is certain to happen, though the time of happening be uncertain.<sup>24</sup>

An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect.<sup>25</sup>

[NOTE. — See Bills of Exchange Act, section 11.]

### § 24. Additional provisions not affecting negotiability.

An instrument which contains an order or promise to do any act in addition to the payment of money is not negotiable.<sup>1</sup> But the negotiable character of an instrument otherwise negotiable is not affected by a provision which:

1. Authorizes the sale of collateral securities in case the instrument be not paid at maturity;<sup>2</sup> or

2. Authorizes a confession of judgment if the instrument be not paid at maturity;<sup>3</sup> or

3. Waives the benefit of any law intended for the advantage or protection of the obligor;<sup>4</sup> or

4. Gives the holder an election to require something to be done in lieu of payment of money.<sup>5</sup>

But nothing in this section shall validate any provision or stipulation otherwise illegal.

<sup>19</sup> Pages 50-54.

<sup>20</sup> Pages 55-61.

<sup>21</sup> Page 49.

<sup>22</sup> Page 97.

<sup>23</sup> Pages 97-102.

<sup>24</sup> Pages 102-103. [Byles on Bills,

<sup>25</sup> Pages 46-50, 103-106.

<sup>1</sup> Pages 90-91.

<sup>2</sup> Pages 91-92.

<sup>3</sup> Page 93.

<sup>4</sup> Page 94.

<sup>5</sup> Pages 94-96.

### § 25. Omissions; seal; particular money.

The validity and negotiable character of an instrument are not affected by the fact that:

1. It is not dated;<sup>6</sup> or
2. Does not specify the value given, or that any value has been given therefor;<sup>6</sup> or
3. Does not specify the place where it is drawn or the place where it is payable;<sup>6</sup> or
4. Bears a seal;<sup>7</sup> or
5. Designates a particular kind of current money in which payment is to be made.<sup>8</sup>

But nothing in this section shall alter or repeal any statute requiring in certain cases the nature of the consideration to be stated in the instrument.<sup>9</sup>

[NOTE. — See Bills of Exchange Act, section 3, subdivision (4).]

### § 26. When payable on demand.

An instrument is payable on demand:

1. Where it is expressed to be payable on demand, or at sight,<sup>10</sup> or on presentation; or
2. In which no time for payment is expressed.<sup>10</sup>

Where an instrument is issued, accepted or indorsed when overdue, it is, as regards the person so issuing, accepting or indorsing it, payable on demand.<sup>11</sup>

[NOTE. — See Bills of Exchange Act, section 10.]

### § 27. When payable to order.

The instrument is payable to order where it is drawn payable to the order of a specified person or to him or his order.<sup>12</sup> It may be drawn payable to the order of:

<sup>6</sup> Pages 158-159. See § 32. "Under most of the continental Codes it is essential that a bill should be dated." Chalmers, p. 13. And state a consideration. *Ib.*, p. 14. And in some it is necessary that a bill should be payable in a place different to that in which it is made. "No distance is fixed by the codes, but it has been decided that the place of payment must be so far distant from the place of issue that there may be a possible rate of exchange between the two." *Ib.*, p. 15.

<sup>7</sup> Pages 159-160. [This is the rule in many states by statute. See Daniel, § 33. See also *Weeks v. Esler*, 143 N. Y. 374.]

<sup>8</sup> Pages 81-89. [Daniel, § 56 *et seq.*, and cases cited.]

<sup>9</sup> See New York Neg. Inst. L., §§ 330-331.

<sup>10</sup> Page 96.

<sup>11</sup> Page 97.

<sup>12</sup> [The Bills of Exchange Act provides that "a bill is payable to order which is expressed to be so payable or which is expressed to be payable to a particular person and does not contain words prohibiting transfer or indicating an intention that it should not be transferable." But this changes the law (*Byles*, 83; *Smith v. Kendall*, 6 T. R. 123; *Maule v. Crawford*, 14 Hun, 193; Daniel on Neg. Inst., section 105), and the change is not deemed advantageous. *Frederick v. Cotton*, 2 Shower, 8; *Smith v. McClure*, 5 East, 476; *Howard v. Palmer*, 64 Me. 86; Daniel, § 106.]

1. A payee who is not maker, drawer or drawee; or
2. The drawer or maker;<sup>13</sup> or
3. The drawee;<sup>14</sup> or
4. Two or more payees jointly;<sup>15</sup> or
5. One or some of several payees;<sup>16</sup> or
6. The holder of an office for the time being.<sup>17</sup>

Where the instrument is payable to order the payee must be named or otherwise indicated therein with reasonable certainty.<sup>18</sup>

[NOTE. — See Bills of Exchange Act, sections 5, 7, 8.]

### § 28. When payable to bearer.

The instrument is payable to bearer:

1. When it is expressed to be so payable;<sup>19</sup> or
  2. When it is payable to a person named therein or bearer;<sup>19</sup>
- or
3. When it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable;<sup>20</sup> or
  4. When the name of the payee does not purport to be the name of any person;<sup>21</sup> or
  5. When the only or last indorsement is an indorsement in blank.<sup>22</sup>

[NOTE. — See Bills of Exchange Act, sections 7, 8.]

### § 29. Terms when sufficient.

The instrument need not follow the language of this chapter, but any terms are sufficient which clearly indicate an intention to conform to the requirements hereof.

### § 30. Date, presumption as to.

Where the instrument or an acceptance or any indorsement thereon is dated, such date is deemed *prima facie* to be the true date of the making, drawing, acceptance or indorsement as the case may be.<sup>23</sup>

[NOTE. — See Bills of Exchange Act, section 13.]

### § 31. Ante-dated and post-dated.

The instrument is not invalid for the reason only that it is ante-dated or post-dated, provided this is not done for an illegal or fraudulent purpose. The person to whom an instrument so dated is delivered acquires the title thereto as of the date of delivery.<sup>24</sup>

[NOTE. — See Bills of Exchange Act, section 13. See *Pasmore v. North*, 13 East, 517; *Breicester v. McCordle*, 8 Wend. 478; *Bayley v. Taber*, 5 Mass. 286.]

<sup>13</sup> Pages 113–114.

<sup>14</sup> Pages 114–115.

<sup>15</sup> Pages 115–118.

<sup>16</sup> Pages 118–120.

<sup>17</sup> Pages 121–122.

<sup>18</sup> Pages 107–113.

<sup>19</sup> Page 122.

<sup>20</sup> Pages 123–144.

<sup>21</sup> Page 144.

<sup>22</sup> Pages 144–148, 291–297. See §§ 64, 70.

<sup>23</sup> Pages 161–163.

<sup>24</sup> Pages 161–163.



**§ 32. When date may be inserted.**

Where an instrument expressed to be payable at a fixed period after date is issued undated, or where the acceptance of an instrument payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the instrument shall be payable accordingly.<sup>25</sup> The insertion of a wrong date does not avoid the instrument in the hands of a subsequent holder in due course; but as to him, the date so inserted is to be regarded as the true date.<sup>1</sup>

[NOTE. — See Bills of Exchange Act, section 12. See note, section 7.]

**§ 33. Blanks; when may be filled.**

Where the instrument is wanting in any material particular, the person in possession thereof has a *prima facie* authority to complete it by filling up the blanks therein.<sup>2</sup> And a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operates as a *prima facie* authority to fill it up as such for any amount.<sup>3</sup> In order, however, that any such instrument, when completed, may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time. But if any such instrument, after completion, is negotiated to a holder in due course, it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time.<sup>4</sup>

[NOTE. — See Bills of Exchange, section 20.] See § 206.

**§ 34. Incomplete instrument not delivered.**

Where an incomplete instrument has not been delivered it will not, if completed and negotiated, without authority, be a valid contract in the hands of any holder, as against any person whose signature was placed thereon before delivery.

[NOTE. — See *Davis Machine Co. v. Best*, 105 N. Y. 59, 67; *Sedgwick v. McKim*, 53 N. Y. 307, 313; *Baxendale v. Bennett*, L. R. 3 Q. B. 525; *Daniel*, §§ 841, 842a.]

**§ 35 Delivery; when effectual; when presumed.**

Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties, and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party

<sup>25</sup> See § 33.

<sup>1</sup> Pages 163–168.

<sup>2</sup> Pages 163–168.

<sup>3</sup> Pages 168–174.

<sup>4</sup> Pages 174–192.

making, drawing, accepting or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument.<sup>5</sup> But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed.<sup>6</sup> And where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved.<sup>6</sup>

[NOTE. — See Bills of Exchange Act, section 21.]

### § 36. Construction where instrument is ambiguous.

Where the language of the instrument is ambiguous, or there are omissions therein, the following rules of construction apply:

1. Where the sum payable is expressed in words and also in figures and there is a discrepancy between the two, the sum denoted by the words is the sum payable; but if the words are ambiguous or uncertain, references may be had to the figures to fix the amount;<sup>7</sup>

2. Where the instrument provides for the payment of interest, without specifying the date from which interest is to run, the interest runs from the date of the instrument, and if the instrument is undated, from the issue thereof;<sup>8</sup>

3. Where the instrument is not dated, it will be considered to be dated as of the time it was issued;<sup>9</sup>

4. Where there is a conflict between the written and printed provisions of the instrument, the written provisions prevail;<sup>10</sup>

5. Where the instrument is so ambiguous that there is doubt whether it is a bill or note, the holder may treat it as either at his election;<sup>11</sup>

6. Where a signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an indorser;<sup>12</sup>

7. Where an instrument containing the words "I promise to pay" is signed by two or more persons, they are deemed to be jointly and severally liable thereon.<sup>13</sup>

[NOTE. — See Bills of Exchange Act, section 9.]

### § 37. Liability of person signing in trade or assumed name.

No person is liable on the instrument whose signature does not appear thereon, except as herein otherwise expressly provided.<sup>14</sup> But

<sup>5</sup> Pages 151–152.

<sup>6</sup> Pages 152–158. See § 34.

<sup>7</sup> Pages 192–194.

<sup>8</sup> Pages 194–195.

<sup>9</sup> Page 195. §§ 25, 30–32.

<sup>10</sup> Pages 195–196.

<sup>11</sup> Page 196.

<sup>12</sup> See §§ 113, 114.

<sup>13</sup> Pages 196–197. [See Bills of Exchange Act, section 85.]

<sup>14</sup> Pages 197–199. See § 72.

one who signs in a trade or assumed name will be liable to the same extent as if he had signed in his own name.

[NOTE. — See Bills of Exchange Act, section 23.]

### § 38. Signature by agent; authority; how shown.

The signature of any party may be made by a duly authorized agent. No particular form of appointment is necessary for this purpose; and the authority of the agent may be established as in other cases of agency.

### § 39. Liability of person signing as agent.

Where the instrument contains or a person adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized;<sup>15</sup> but the mere addition of words describing him as an agent, or as filling a representative character, without disclosing his principal, does not exempt him from personal liability.<sup>16</sup>

[NOTE. — See Bills of Exchange Act, section 26; Byles on Bills, 36; Daniel, §§ 298-302.]

### § 40. Signature by procuration; effect of.

A signature by "procuration" operates as notice that the agent has but a limited authority to sign, and the principal is bound only in case the agent in so signing acted within the actual limits of his authority.<sup>17</sup>

[NOTE. — See Bills of Exchange Act, section 25; Byles on Bills, 33; Daniel, § 280.]

### § 41. Effect of indorsement by infant or corporation.

The indorsement or assignment of the instrument by a corporation or by an infant passes the property therein, notwithstanding that from want of capacity the corporation or infant may incur no liability thereon.<sup>18</sup>

[NOTE. — See Bills of Exchange Act, section 22.]

<sup>15</sup> Pages 216-219.

<sup>16</sup> Pages 199-216.

<sup>17</sup> Pages 219-220.

<sup>18</sup> Pages 220-221. This section "is probably declaratory, but the law was not very clear." Chalmers, p. 60. "Capacity to incur liability must be distinguished from capacity to transfer. \* \* \* An indorsement usually consists of two distinct contracts, one executed, the other executory. It transfers the property in the bill, and

it also involves a contingent liability on the part of the indorser." (Ib.)

"By this section, when a bill is payable to the order of an infant, his indorsement transfers the property therein. \* \* \* In America it is not uncommon to get a bill made payable to the order of an infant clerk. His indorsement then operates as an indorsement *sans recours*, though without discrediting the bill." (Ib., p. 63.)

**§ 42. Forged signature; effect of.**

Where a signature is forged or made without authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature,<sup>19</sup> unless the party, against whom it is sought to enforce such right, is precluded from setting up the forgery or want of authority.<sup>20</sup>

[NOTE. — See Bills of Exchange Act, section 24.]

**ARTICLE IV.****CONSIDERATION.****SECTION 50. Presumption of consideration.**

51. What constitutes consideration.

52. What constitutes holder for value.

53. When lien on instrument constitutes holder for value.

54. Effect of want of consideration.

55. Liability of accommodation party.

**§ 50. Presumption of consideration.**

Every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration; and every person whose signature appears thereon to have become a party thereto for value.<sup>21</sup>

[NOTE. — See Bills of Exchange Act, section 30.]

**§ 51. What constitutes consideration.**

Value<sup>22</sup> is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value; and is deemed such whether the instrument is payable on demand or at a future time.<sup>23</sup>

**§ 52. What constitutes holder for value.**

Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time.<sup>24</sup>

[NOTE. — See Bills of Exchange Act, section 27, subdivision (2)].

**§ 53. When lien on instrument constitutes holder for value.**

Where the holder has a lien on the instrument, arising either from

<sup>19</sup> Pages 221–225.

<sup>21</sup> Pages 234–238.

<sup>20</sup> Pages 225–233. “The word ‘precluded’ was inserted in committee in lieu of the word ‘estopped,’ an English technical term, unknown to the Scotch law.” Chalmers, p. 74.

<sup>22</sup> See § 2.

<sup>23</sup> Pages 239–249.

<sup>24</sup> Pages 249–251. A holder for value may or may not be a holder in due course. See § 91.

contract or by implication of law, he is deemed a holder for value to the extent of his lien.<sup>25</sup>

[NOTE. — See Bills of Exchange Act, section 27.]

### § 54. Effect of want of consideration.

Absence or failure of consideration is matter of defense as against any person not a holder in due course;<sup>1</sup> and partial failure of consideration is a defense *pro tanto* whether the failure is an ascertained and liquidated amount or otherwise.<sup>2</sup>

### § 55. Liability of accommodation party.

An accommodation party is one who has signed the instrument as maker, drawer, acceptor or indorser, without receiving value therefor,<sup>3</sup> and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party.<sup>4</sup>

[NOTE. — See Bills of Exchange Act, section 28.]

## ARTICLE V.

### NEGOTIATION.

#### SECTION 60. What constitutes negotiation.

61. Indorsement; how made.
62. Indorsement must be of entire instrument.
63. Kinds of indorsement.
64. Special indorsement; indorsement in blank.
65. Blank indorsement; how changed to special indorsement.
66. When indorsement restrictive.
67. Effect of restrictive indorsement; rights of indorsee.
68. Qualified indorsement.
69. Conditional indorsement.
70. Indorsement of instrument payable to bearer.
71. Indorsement where payable to two or more persons.
72. Effect of instrument drawn or indorsed to a person as cashier.
73. Indorsement where name is wrongly designated or misspelled.
74. Indorsement in representative capacity.
75. Time of indorsement; presumption.
76. Place of indorsement; presumption.

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<sup>25</sup> Pages 252-253. Discount must be distinguished from pledge or deposit for security. A discounter or purchaser of the bill is a holder for full value. A pledgee is a trustee of the pledgor. If the pledgor could have sued on the instrument the pledgee may recover the whole amount, accounting to the pledgor for any surplus above the amount of the lien;

otherwise he can recover only the amount of the lien. Chalmers, p. 86.

<sup>1</sup> See § 91.

<sup>2</sup> Pages 253-254. An immediate party stands in the same relation as one who is not a holder in due course. See Chalmers, p. 95.

<sup>3</sup> Pages 257-258.

<sup>4</sup> Pages 254-258.

SECTION 77. Continuation of negotiable character.

78. Striking out indorsement.

79. Transfer without indorsement; effect of.

80. When prior party may negotiate instrument.

### § 60. What constitutes negotiation.

An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof.<sup>5</sup> If payable to bearer<sup>6</sup> it is negotiated by delivery; if payable to order it is negotiated by the indorsement of the holder completed by delivery.<sup>7</sup>

[NOTE.— See Bills of Exchange Act, sections 31, subdivisions (1), (2) and (3).]

### § 61. Indorsement; how made.

The indorsement must be written on the instrument itself or upon a paper attached thereto.<sup>8</sup> The signature of the indorser, without additional words, is a sufficient indorsement.<sup>9</sup>

### § 62. Indorsement must be of entire instrument.

The indorsement must be an indorsement of the entire instrument. An indorsement, which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the instrument to two or more indorsee severally, does not operate as a negotiation of the instrument.<sup>10</sup> But where the instrument has been paid in part, it may be indorsed as to the residue.<sup>11</sup>

[NOTE.— See Bills of Exchange Act, section 32, subdivision (2); Daniel, § 668.]

### § 63. Kinds of indorsement.

An indorsement may be either special or in blank; and it may also be either restrictive or qualified, or conditional.

<sup>5</sup> Page 259. See "holder" defined, § 2.

<sup>6</sup> Pages 260-261.

<sup>7</sup> Pages 261-266 (including indorsement in form of assignment and of guaranty).

<sup>8</sup> Pages 266-267. [*Crosby v. Roub*, 16 Wis. 616; *Folger v. Chase*, 18 Pick. 63; *French v. Turner*, 15 Ind. 59. The rule as commonly stated is, that where there is not room on the bill, the indorsement may be on an allonge. But it is not necessary that there should be a physical impossibility of writing the indorsement on the instrument itself; it may be on an allonge whenever the necessity or convenience of the parties require it. (See cases above cited.) Besides, any such statement

of the rule would give rise to a question of fact which might be determined variously.] See Bills of Exchange Act, section 32. "Some of the foreign codes contain minute provisions to prevent frauds, *e. g.*, that the first indorsement on the allonge must begin on the bill and end on the allonge; otherwise an allonge might be taken from one bill and stuck on to another." Chalmers, p. 107.

<sup>9</sup> See §§ 63-64.

<sup>10</sup> Pages 267-268.

<sup>11</sup> "C, the holder of a bill for 100 l., indorses it, 'Pay D, or order, 30 l.' This is invalid, unless C also acknowledge the receipt of 70 l. (*Hawkins v. Cardy*, 1 Ld. Raym. 360.)" Chalmers, p. 107.

### § 64. Special indorsement; indorsement in blank.

A special indorsement specifies the person to whom, or to whose order the instrument is to be payable; and the indorsement of such indorsee is necessary to the further negotiation of the instrument.<sup>12</sup> An indorsement in blank specifies no indorsee, and an instrument so indorsed is payable to bearer, and may be negotiated by delivery.<sup>13</sup>

[NOTE. — See Bills of Exchange Act, section 34.]

### § 65. Blank indorsement; how changed to special indorsement.

The holder may convert a blank indorsement into a special indorsement by writing over the signature of the indorser in blank any contract consistent with the character of the indorsement.<sup>14</sup>

[NOTE. — See Bills of Exchange Act, section 34; Daniel, § 694, and cases cited.]

### § 66. When indorsement restrictive.

An indorsement is restrictive, which either:

1. Prohibits the further negotiation of the instrument;<sup>15</sup> or
2. Constitutes the indorsee the agent of the indorser;<sup>16</sup> or
3. Vests the title in the indorsee in trust for or to the use of some other person.<sup>17</sup>

But the mere absence of words implying power to negotiate does not make an indorsement restrictive.<sup>18</sup>

[NOTE. — Illustrations:

- (1) Pay Bank of A. only. For deposit in Bank of A. only.
- (2) Pay A. Cashier, or order, for collection.
- (3) Pay A. for account of C.

The language of the Bills of Exchange Act, (§ 35), is: "It is a mere authority to deal with the bill as thereby directed, and not a transfer of the ownership thereof." But this cannot apply to the indorsement mentioned in subdivision (3); for in such a case the indorser means that the title shall pass. Thus, if the indorsement is "Pay A for use of B" the title passes to A; but the indorsement is restrictive to the extent that it gives notice that the instrument cannot be negotiated by A for his own debt or for his own benefit. *Hook v. Pratt*, 78 N. Y. 371, 375.]

<sup>12</sup> Page 268. See §§ 28, 70.

<sup>13</sup> Pages 268-271. See § 28. "Bill payable to the order of John Smith. He signs on the back 'John Smith.' This act is interpreted by the law merchant as an indorsement in blank by John Smith, and operates as if he had written: 1. I hereby assign this bill to bearer. 2. I hereby undertake that if this bill be dishonored, I, on receiving due notice thereof, will indemnify the bearer." (Chalmers, p. 110. See § 116.

<sup>14</sup> Pages 268-271. "The holder of a bill, indorsed by C in blank, writes over C's signature the words, 'Pay to the order of D.' The holder who does this is not liable as an indorser, but the transaction operates as a special indorsement from C to D. (*Vincent v. Horlock*, 1 Camp. 442.)" Chalmers, p. 112.

<sup>15</sup> Pages 271-274.

<sup>16</sup> Pages 274-277.

<sup>17</sup> Pages 277-280.

<sup>18</sup> Pages 272-274.

**§ 67. Effect of restricting indorsement; rights of indorsee.**

A restrictive indorsement confers upon the indorsee the right:

1. To receive payment of the instrument;
2. To bring any action thereon that the indorser could bring;
3. To transfer his rights as such indorsee, where the form of the indorsement authorizes him to do so.

But all subsequent indorsees acquire only the title of the first indorsee under the restrictive indorsement.

[NOTE. — See Bills of Exchange Act, section 35.]

Pages 280–284 See § 77.

**§ 68. Qualified indorsement.**

Qualified indorsement constitutes the indorser a mere assignor of the title to the instrument.<sup>19</sup> It may be made by adding to the indorser's signature the words "without recourse" or any words of similar import. Such an indorsement does not impair the negotiable character of the instrument.<sup>20</sup>

[NOTE. — See Daniel, § 700.] See Bills of Exchange Act, section 16.

**§ 69. Conditional indorsement.**

Where an indorsement is conditional, a party required to pay the instrument may disregard the condition, and make payment to the indorsee or his transferee, whether the condition has been fulfilled or not. But any person to whom an instrument so indorsed is negotiated, will hold the same, or the proceeds thereof, subject to the rights of the person indorsing conditionally.

[NOTE. — The first sentence is the same as section 33 of the Bills of Exchange Act with a slight modification. In his note to that section Judge Chalmers says: "This section alters the law. It was formerly held that if a bill was indorsed conditionally, the acceptor paid it at his peril if the condition was not fulfilled. This was hard on him. If he dishonored the bill he might be liable to damages, and yet it might be impossible for him to find out if the condition had been fulfilled." See Daniel, §§ 697, 698a. There appear to be no American cases upon the subject; and the only English case is that of *Robertson v. Kensington*, 4 Taunt. 30.]

Page 287.

**§ 70. Indorsement of instrument payable to bearer.**

Where an instrument, payable to bearer, is indorsed specially, it may nevertheless be further negotiated by delivery; but the person indorsing specially is liable as indorser to only such holders as make title through his indorsement.<sup>21</sup>

**§ 71. Indorsement where payable to two or more persons.**

Where an instrument is payable to the order of two or more payees

<sup>19</sup> See § 115.

<sup>20</sup> Pages 284–287.

<sup>21</sup> Pages 288–298.



or indorsees who are not partners, all must indorse, unless the one indorsing has authority to indorse for the others.<sup>22</sup>

[NOTE. — See Bills of Exchange Act, section 32, subdivision (3). Daniel, § 701a.]

### § 72. Effect of instrument drawn or indorsed to a person as cashier.

Where an instrument is drawn or indorsed to a person as “cashier” or other fiscal officer of a bank or corporation, it is deemed *prima facie* to be payable to the bank or corporation of which he is such officer; and may be negotiated by either the indorsement of the bank or corporation, or the indorsement of the officer.<sup>23</sup>

### § 73. Indorsement where name is wrongly designated or misspelled.

Where the name of a payee or indorsee is wrongly designated or misspelled, he may indorse the instrument as therein described, adding, if he thinks fit, his proper signature.<sup>24</sup>

[NOTE. — See Bills of Exchange Act, section 32, subdivision (4).]

### § 74. Indorsement in representative capacity.

Where any person is under obligation to indorse in a representative capacity, he may indorse in such terms as to negative personal liability.

[NOTE. — Same as Bills of Exchange Act, section 31, subdivision (5).] § 68; also § 39.

### § 75. Time of indorsement; presumption.

Except where an indorsement bears date after the maturity of the instrument, every negotiation is deemed *prima facie* to have been effected before the instrument was overdue.<sup>25</sup>

[NOTE. — See Bills of Exchange Act, section 36, subdivision (4). *New Orleans, etc. v. Montgomery*, 95 U. S. 1; *Collins v. Gilbert*, 94 U. S. 753. See also numerous cases cited in Daniel, § 728.]

### § 76. Place of indorsement; presumption.

Except where the contrary appears every indorsement is presumed *prima facie* to have been made at the place where the instrument is dated.<sup>1</sup>

[For summary of rules governing conflict of laws, see Bills of Exchange Act, § 72.]

<sup>22</sup> Page 298.

<sup>23</sup> Pages 299-300. See § 37.

<sup>24</sup> Pages 301-302. “A question sometimes arises as to how a bill payable (say) to ‘Mrs. John Jones’ should be indorsed. The proper form appears to be ‘Ellen Jones, wife of John Jones.’

The form sometimes adopted, viz., ‘Mrs. John Jones,’ is clearly irregular, though its invalidity has never been decided.” Chalmers, p. 109.

<sup>25</sup> Page 302. See § 91.

<sup>1</sup> Pages 302-305.

**§ 77. Continuation of negotiable character.**

An instrument negotiable in its origin continues to be negotiable until it has been restrictively indorsed<sup>2</sup> or discharged by payment<sup>3</sup> or otherwise.<sup>4</sup>

[NOTE. — See Bills of Exchange Act, section 36.]

**§ 78. Striking out indorsement.**

The holder may at any time strike out any indorsement which is not necessary to his title<sup>5</sup>. The indorser whose indorsement is struck out and all indorsers subsequent to him, are thereby relieved from liability on the instrument.<sup>6</sup>

**§ 79. Transfer without indorsement; effect of.**

Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferer had therein, and the transferee acquires, in addition, the right to have the indorsement of the transferer. But for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made.<sup>7</sup>

**§ 80. When prior party may negotiate instrument.**

Where an instrument is negotiated back to a prior party,<sup>8</sup> such party may, subject to the provisions of this chapter,<sup>9</sup> reissue and further negotiate the same.<sup>10</sup> But he is not entitled to enforce payment thereof against any intervening party to whom he was personally liable.<sup>11</sup>

[NOTE. — See Bills of Exchange Act, section 37.]

**ARTICLE VI.****RIGHTS OF HOLDER.****SECTION 90. Right of holder to sue; payment.**

91. What constitutes a holder in due course.

92. When person not deemed holder in due course.

93. Notice before full amount paid.

94. When title defective.

95. What constitutes notice of defect.

96. Rights of holder in due course.

97. When subject to original defenses.

98. Who deemed holder in due course.

<sup>2</sup> See §§ 66-67.

<sup>3</sup> See § 200.

<sup>4</sup> Page 306.

<sup>5</sup> Pages 306-307.

<sup>6</sup> See § 116.

<sup>7</sup> Pages 307-310. [This is the same as Bills of Exchange Act, sec. 31, sub-division (4). It establishes the equit-

able rules as the rule at law. Daniel, § 741.]

<sup>8</sup> See § 202.

<sup>9</sup> See §§ 200-206, as to discharges.

<sup>10</sup> Pages 310-313.

<sup>11</sup> Pages 310-313. This is a rule against circuity of action.

### § 90. Right of holder to sue; payment.

The holder <sup>12</sup> of a negotiable instrument may sue thereon in his own name; <sup>13</sup> and payment to him in due course discharges the instrument. <sup>14</sup>

[NOTE. — See Bills of Exchange Act, section 38, subdivisions (1) and (3).]

### § 91. What constitutes a holder in due course.

A holder in due course is a holder who has taken the instrument under the following conditions:

1. That it is complete and regular upon its face; <sup>15</sup>
2. That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact; <sup>16</sup>
3. That he took it in good faith and for value; <sup>17</sup>
4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it. <sup>18</sup>

[NOTE. — See Bills of Exchange Act, section 29, subdivisions (a) and (b).] “The act has substituted the term ‘holder in due course’ for the cumbrous equivalent *bona fide* holder for value without notice.” Chalmers, p. 90.

### § 92. When person not deemed holder in due course.

Where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course. <sup>19</sup>

[NOTE. — See Bills of Exchange Act, section 36, subdivision (3). *Crim v. Stockweather*, 88 N. Y. 339; *Herrick v. Woolverton*, 41 N. Y. 581]

### § 93. Notice before full amount paid.

Where the transferee receives notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid the full amount agreed to be paid therefor, he will be deemed a holder in due course only to the extent of the amount theretofore paid by him. <sup>20</sup>

### § 94. When title defective.

The title of a person who negotiates an instrument is defective within the meaning of this chapter when he obtained the instrument, or

<sup>12</sup> See § 2. “The Act deals only with transfer by negotiation, that is, transfer according to the law merchant. It leaves untouched the rules of general law which regulate the transmission of bills by act of law, and their transfer as choses in action or chattels according to the general law,” (e. g., by marriage, death, bankruptcy, sale on execution, etc.) Chalmers, p. 125.

<sup>13</sup> Pages 314–318.

<sup>14</sup> See §§ 148, 200.

<sup>15</sup> Pages 319–320. See §§ 32–33.

<sup>16</sup> Pages 320–337.

<sup>17</sup> Pages 337–340. See § 51.

<sup>18</sup> Pages 340–357. See § 95.

<sup>19</sup> Page 323.

<sup>20</sup> Pages 357–360.

any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.<sup>21</sup>

[NOTE. — See Bills of Exchange Act, section 29, subdivision (2).] “This list of defects in title may not be exhaustive. A person whose title is defective must be distinguished from a person who has no title at all, and who can give none; as for instance, a person making title through a forged indorsement. The words ‘force and fear’ were inserted in committee as the equivalent of the English technical term duress, which is unknown to Scotch law. (See Bell’s Principles, 9th ed., § 12.)” Chalmers, p. 92.

### § 95. What constitutes notice of defect.

To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith.<sup>22</sup>

### § 96. Rights of holder in due course.

A holder in due course holds the instrument free from any defect of title of prior parties and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon.<sup>23</sup>

[NOTE. — See Bills of Exchange Act, section 38, subdivision (2).]

### § 97. When subject to original defenses.

In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable. But a holder<sup>24</sup> who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter.<sup>25</sup>

### § 98. Who deemed holder in due course.

Every holder is deemed *prima facie* to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course.<sup>1</sup> But the last mentioned rule does not apply

<sup>21</sup> Pages 370–399.

<sup>22</sup> Pages 338–357. See Bills of Exchange Act, § 90.

<sup>23</sup> Pages 361–365. [*Cromwell v. County of Sac.* 96, U. S. 51, 60.]

<sup>24</sup> “Whether for value or not.” Bills of Exchange Act, § 29, subsec. (3).

<sup>25</sup> Pages 360–361.

<sup>1</sup> Pages 365–370. See *Tatam v. Haslar*, L. R. 23 Q. B. D. 345, construing Bills of Exchange Act, § 30, subsec. (2).

in favor of a party who became bound on the instrument prior to the acquisition of such defective title.

[NOTE. — This is similar to Bills of Exchange Act, section 30, subdivision (2); but the phraseology has been changed so as to better harmonize with the language of section 55, (N. Y. § 94), which is the same as Bills of Exchange Act, section 29, subdivision (2). The language of the Bills of Exchange Act is “subsequent to the alleged fraud or illegality.” But this is not quite correct; for the holder may be a holder in due course, though the fraud or illegality was in the transfer to him. The last sentence has no equivalent in the Bills of Exchange Act; but it is necessary to qualify the general statement. If A issues his note to B, and C gets possession of it and fraudulently negotiates it to D, the fraud of C in nowise affects A, and is no defense to him when sued on the instrument by D.]

## ARTICLE VII.

### LIABILITIES OF PARTIES.

**SECTION 110.** Liability of maker.

111. Liability of drawer.

112. Liability of acceptor.

113. When person deemed indorser.

114. Liability of irregular indorser.

115. Warranty; where negotiation by delivery or by a qualified indorsement.

116. Liability of general indorser.

117. Liability of indorser where paper negotiable by delivery.

118. Order in which indorsers are liable.

119. Liability of agent or broker.

#### § 110. Liability of maker.

The maker of a negotiable instrument by making it engages that he will pay it according to its tenor;<sup>2</sup> and admits the existence of the payee and his then capacity to indorse.<sup>3</sup>

[NOTE. — See Bills of Exchange Act, section 88.]

#### § 111. Liability of drawer.

The drawer by drawing the instrument admits the existence of the payee and his then capacity to indorse; and engages that on due presentment the instrument will be accepted and paid, or both, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it.<sup>4</sup>

<sup>2</sup> Page 400. “The maker of a promissory note is the principal debtor on the instrument. The maker is sometimes called the drawer, but the primary and absolute liability of the maker of a note must be distinguished from the secondary and conditional liability of the drawer of a bill of exchange. In general the maker of a note corresponds with the acceptor of a bill of exchange, and the same rules apply to both.” Chalmers, p. 270. See § 130.

<sup>3</sup> Pages 401–403.

<sup>4</sup> Pages 418–419. Bills of Exchange Act, § 55, subsec. (1). The drawer’s liability is similar to that of the indorser’s. See § 116.

But the drawer may insert in the instrument an express stipulation negating or limiting his own liability to the holder.<sup>5</sup>

### § 112. Liability of acceptor.

The acceptor by accepting<sup>6</sup> the instrument engages that he will pay it according to the tenor of his acceptance<sup>7</sup> and admits:

1. The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument;<sup>8</sup> and

2. The existence of the payee and his then capacity to indorse.<sup>9</sup>

[NOTE. — See Bills of Exchange Act, section 54. The Bills of Exchange Act contains the words, "but not the genuineness or validity of his indorsement." But as the section purports to specify what the acceptance admits, all other matters are necessarily excluded by implication. To specify in some instances and not in others what is excluded destroys the symmetry of the Act, and, besides, might give rise to doubts as to its construction.]

### § 113. When person deemed indorser.

A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity.<sup>10</sup>

[NOTE. — Section 56 of the Bills of Exchange Act provides: "Where a person signs a bill otherwise than as drawer or acceptor, he thereupon incurs the liabilities of an indorser to a holder in due course." But this language is too broad. There is no reason why one should not bind himself as guarantor or surety to a holder in due course if he clearly indicates such an intent. The language "otherwise than as maker," etc., would not meet the case of a signature so placed that there would be a question whether the person signing meant to bind himself as joint maker or otherwise. But the point is corrected in section 17 (N. Y. § 36), by the provision "that where a signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign, he will be deemed an indorser."]

### § 114. Liability of irregular indorser.

Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as indorser<sup>11</sup> in accordance with the following rules:

1. If the instrument is payable to the order of a third person, he is liable to the payee and all subsequent parties.

<sup>5</sup> [See Bills of Exchange Act, section 16.] See § 68.

<sup>6</sup> As to acceptances, see §§ 220-230.

<sup>7</sup> The acceptor is a primary party and absolutely liable. See § 3. No demand on him is necessary to fix his liability. See § 130.

<sup>8</sup> Pages 403-418.

<sup>9</sup> Same as in § 110. "This section deals only with estoppels arising on

the bill. There may, of course, be other estoppels arising on evidence. (See § 42, *ante*.) If the amount of the bill be altered, or if any other material alteration be made in it, the acceptor is not precluded by this section from setting it up." Chalmers, p. 185.

<sup>10</sup> Pages 458-459.

<sup>11</sup> Pages 446-458.

2. If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer.

3. If he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee.

[NOTE. — This section is intended to cover irregular indorsements. On this subject the decisions are very conflicting. In some jurisdictions a person placing his signature on the back of a note before the payee has indorsed is deemed a joint maker; in other jurisdictions he is regarded as a guarantor; and in still others as an indorser; and those courts which hold him to be an indorser differ as to whether he is a first or second indorser. The cases are too numerous to be cited here. Many of them will be found in Daniel on Negotiable Instruments, sections 707-719. The rule stated above is embodied in part in section 3117 of the Civil Code of California, which reads: "One who indorses a negotiable instrument before it is delivered to the payee is liable to the payee thereon, as an indorser." This is also the effect (probably) of section 56 of the Bills of Exchange Act. (See Chalmers on Bills, Notes and Cheques, section 56.) The California rule is adopted because it is conducive to certainty, and because it appears to accord more nearly with what must have been the intention of the parties. When a plain man puts his signature on the back of a negotiable instrument he ordinarily understands that he is becoming liable as an indorser; and if he puts it there before the instrument is delivered, he usually does so for the purpose of giving the maker or drawer credit with the payee or other person to whom it is negotiated. In many of the cases the reasoning is highly technical, and the decisions are based upon considerations which, in all probability, never entered the heads of the parties themselves. The California Code makes no provision for a case where the instrument is drawn to the order of the maker or drawer. This is covered by subdivision 2, above. Subdivision 3 is added to provide for a case where, the payee being unable to enforce payment, there might be a question whether the indorser would be liable to a person claiming under the payee.

#### ILLUSTRATIONS.

Note made by A, payable to order of B, indorsed by C, and afterwards delivered to B. C is liable as indorser to B.

Note made by A, payable to order of himself, indorsed by B, and afterwards delivered to C. B is liable as indorser to C.

Note made by A, to order of B, indorsed by C before B, but for accommodation of B, and discounted by Bank of X. C is liable as indorser to Bank of X and not to B.]

"*Avals*. — Such an indorsement as is referred to by this section would in continental countries be termed an 'aval,' which is said by Lord Blackburn to be an antiquated term signifying 'underwriting.' (5 App. Cas. at p. 772.) According to Pothier (as cited by Lord Blackburn, *supra*), an 'aval' might be either on the bill itself or on a separate paper, and if such an 'aval' was given by anyone, his obligation to all subsequent holders of the bill was precisely the same as that of the person to facilitate whose transfer the aval was given, and under whose signature it was written. English and Scotch law, as Lord Blackburn proceeds to point out, do not go so far as this. If a person, not the holder, indorse a bill, he is not a surety for the drawee or acceptor to the drawer; 'such an indorsement creates no obligation to those who previously were parties to the bill, it is solely for the benefit of those who take subsequently. It is not a collateral engagement, but one on the bill, and it is for that reason and because the original bill has incident to it the capacity of an indorsement in the nature of an 'aval,' that such an indorsement requires no

*new stamp.* (*Steele v. McKinlay*, 5 App. 754; see also, at p. 782, per Lord Watson, and his comments thereon, in *Macdonald v. Whitfield*, 8 App. Cas. 733, at p. 748.) "Chalmers, pp. 189-190.

### § 115. Warranty where negotiation by delivery or by a qualified indorsement.

Every person negotiating an instrument by delivery or by a qualified indorsement, warrants:<sup>12</sup>

1. That the instrument is genuine and in all respects what it purports to be;
2. That he has a good title to it;
3. That all prior parties had capacity to contract;
4. That he has no knowledge of any fact which would impair the validity of the instrument or render it valueless.

But when the negotiation is by delivery only, the warranty extends in favor of no holder other than the immediate transferee. The provisions of subdivision three of this section do not apply to persons negotiating public or corporate securities, other than bills and notes.

[NOTE. — Where there is a latent defect, as for example, usury, it is not covered by the implied warranty of a person negotiating the instrument without indorsement. In such cases *scienter* is necessary in order to render the transferer liable. (*Littauer v. Goldman*, 72 N. Y. 506.) Nor would he be liable if the maker of the note had become insolvent unless he knew such fact. (*Bicknall v. Waterman*, 5 R. I. 43; *Fenn v. Harrison*, 3 T. R. 757; *Fydel v. Clark*, 1 Esp. 447.) The application of the rule of commercial paper to persons selling corporate bonds, etc., would work great hardships and much public inconvenience. (See *Otis v. Cullum*, 92 U. S. 448.)]

See Bills of Exchange Act, section 58, subsection (3). "There is some confusion in the cases owing to the distinction between the warranty of genuineness and the liability on the consideration having been lost sight of. The warranty of genuineness is an incident of the contract of sale, and it is immaterial whether the thing sold be a bill or any other personal chattel. The transferer is for this purpose an ordinary vendor." Chalmers, p. 196.

### § 116. Liability of general indorser.

Every indorser<sup>13</sup> who indorses without qualification, warrants to all subsequent holders in due course:

1. The matter and things mentioned in subdivisions one, two and three of the next preceding section; and,
2. That the instrument is at the time of his indorsement valid and subsisting.<sup>14</sup>

And, in addition, he engages that on due presentment, it shall be accepted or paid, or both, as the case may be, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it.<sup>15</sup>

[NOTE. — See Bills of Exchange Act, section 55, subdivision (2). The language of the Bills of Exchange Act fixing the liabilities of the various parties

<sup>12</sup> Pages 419-437.

<sup>13</sup> Pages 439-440.

<sup>14</sup> Pages 437-439.

<sup>15</sup> Pages 442-445.



is uniformly, "is precluded from denying, etc." But this is stating the effect of the principle and not the principle itself. Upon such a statement the question arises: Why is he precluded? The reason is that he has given implied warranties and admissions. The more scientific method is to state what these warranties and admissions are, and the other will follow by implication.]\*

### § 117. Liability of indorser where paper negotiable by delivery.

Where a person places his indorsement on an instrument negotiable by delivery he incurs all the liabilities of an indorser.<sup>16</sup>

[NOTE. — See Daniel, § 663a, and cases there cited.]

### § 118. Order in which indorsers are liable.

As respects one another, indorsers are liable *prima facie* in the order in which they indorse; but evidence is admissible to show that as between or among themselves they have agreed otherwise.<sup>17</sup> Joint payees or joint indorsers who indorse are deemed to indorse jointly and severally.<sup>18</sup>

[NOTE. — Evidence to show an agreement for a joint liability: See *Easterly v. Barber*, 66 N. Y. 433; *Phillips v. Preston*, 5 How. (U. S.) 278; *Edelen v. White*, 6 Bush, 408. Contra: *Johnson v. Ramsay*, 43 N. J. L. 279; Daniel, § 703. Evidence to show contract that one was to be prior indorser: See *Slack v. Kirk*, 77 Pa. St. 380; *Reinhart v. Schall*, 69 Md. 352; *Slagel v. Rust*, 4 Gratt. 274; Daniel, § 704. As to joint payees indorsing: See *Lane v. Stacy*, 8 Allen, 41; Daniel, § 704.]

### § 119. Liability of an agent or broker.

Where a broker or other agent negotiates an instrument without indorsement, he incurs all the liabilities prescribed by section one hundred and fifteen of this chapter, unless he discloses the name of his principal, and the fact that he is acting only as agent.<sup>19</sup>

[NOTE. — See *Meridan Nat. Bank v. Gallaudet*, 120 N. Y. 298; *Cabot Bank v. Morton*, 4 Gray, 156; *Worthington v. Cowles*, 112 Mass. 30.]

## ARTICLE VIII.

### PRESENTMENT FOR PAYMENT.

SECTION 130. Effect of want of demand on principal debtor.

131. Presentment where instrument is not payable on demand.

132. What constitutes a sufficient presentment.

133. Place of presentment.

134. Instrument must be exhibited.

135. Presentment where instrument payable at bank.

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\*The following provision in the original draft was omitted in the final revision: [But the provisions of this section do not apply to an indorser to whom the instrument has been indorsed restrictively as agent only. *National Park Bank v. Seaboard National Bank*, 114 N. Y. 28; *United States v. American Exchange Nat. Bank*, 70 Fed. Rep. 232.] See pages 439-440.

<sup>16</sup> Page 443.

<sup>18</sup> Page 466.

<sup>17</sup> Pages 459-465.

<sup>19</sup> Pages 441-442.

## SECTION 136. Presentment where principal debtor is dead.

- 137. Presentment to persons liable as partners.
- 138. Presentment to joint debtors.
- 139. When presentment not required to charge the drawer.
- 140. When presentment not required to charge the indorser.
- 141. When delay in making presentment is excused.
- 142. When presentment may be dispensed with.
- 143. When instrument dishonored by non-payment.
- 144. Liability of person secondarily liable, when instrument dishonored.
- 145. Time of maturity.
- 146. Time; how computed.
- 147. Rule where instrument payable at bank.
- 148. What constitutes payment in due course.

**§ 130. Effect of want of demand on principal debtor.**

Presentment for payment is not necessary in order to charge the person primarily liable on the instrument;<sup>20</sup> but if the instrument is, by its terms, payable at a special place, and he is able and willing to pay it there at maturity and has funds there available for that purpose, such ability and willingness are equivalent to a tender of payment upon his part. But except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers.<sup>21</sup>

[NOTE.— See Bills of Exchange Act, section 52; *Hills v. Place*, 48 N. Y. 520, 523; *Parker v. Stroud*, 98 N. Y. 379, 384; *Cox v. National Bank*, 100 U. S. 713; *Wallace v. McConnell*, 13 Peters, 136; *Lozier v. Horan*, 55 Iowa, 77; *Insurance Company v. Wilson*, 29 W. Va. 543.]

**§ 131. Presentment where instrument is not payable on demand [and where payable on demand].**

Where the instrument is not payable on demand, presentment must be made on the day it falls due.<sup>22</sup> Where it is payable on demand, presentment must be made within a reasonable time<sup>23</sup> after its issue,<sup>24</sup> except that in the case of a bill of exchange, presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof.<sup>25</sup>

[NOTE.— See Bills of Exchange Act, section 45, subdivision (2). All the authorities agree that checks and bills of exchange payable on demand must be presented promptly; but as to promissory notes drawn so payable there is much conflict. In *Merritt v. Todd* (23 N. Y. 28) the rule was laid down by the Court of Appeals of New York that “a promissory note payable on demand, with interest, is a continuing security; that an indorser remains liable until an actual demand, and that the holder is not chargeable with neglect for omitting to make such demand within any particular time.” The doctrine of this case has been much criticised. [The rule of this case was

<sup>20</sup> Pages 477–480.<sup>21</sup> Page 480. See §§ 111, 116.<sup>22</sup> Page 483.<sup>23</sup> See § 4, *ante*.<sup>24</sup> Pages 483–490.<sup>25</sup> Pages 490–494. See §§ 241, 322.

held to be changed by this section of the Neg. Inst. Law in *Com. Nat. Bk. v. Zimmerman*, 185 N. Y. 210, reported herein at p. 483.] In some States the time within which promissory notes, payable on demand, must be presented, is fixed by statute. California Civil Code, section 3248; Connecticut Gen'l Statutes, p. 405, section 1859; Minnesota Statutes (1891), section 2104.]

### § 132. What constitutes a sufficient presentment.

Presentment for payment, to be sufficient, must be made:

1. By the holder, or by some person authorized to receive payment on his behalf;<sup>1</sup>
2. At a reasonable hour on a business day;<sup>2</sup>
3. At a proper place as herein defined;<sup>3</sup>
4. To the person primarily liable on the instrument, or if he is absent or inaccessible, to any person found at the place where the presentment is made.<sup>4</sup>

### § 133. Place of presentment.

Presentment for payment is made at the proper place:

1. Where a place of payment is specified in the instrument and it is there presented;<sup>5</sup>
2. Where no place of payment is specified, but the address of the person to make payment is given in the instrument and it is there presented;<sup>6</sup>
3. Where no place of payment is specified and no address is given and the instrument is presented at the usual place of business or residence of the person to make payment;<sup>7</sup>
4. In any other case if presented to the person to make payment wherever he can be found, or if presented at his last known place of business or residence.<sup>8</sup>

[NOTE. — See Bills of Exchange Act, section 45, subdivision (4).]

### § 134. Instrument must be exhibited.

The instrument must be exhibited to the person from whom pay-

<sup>1</sup> Pages 480-482. [See Bills of Exchange Act, section 45, subdivision (2). *Daniel*, §§ 571-587.]

<sup>2</sup> Pages 494-495. [*Salt Springs Nat. Bank v. Burton*, 58 N. Y. 430, 432; *Farnsworth v. Allen*, 4 Gray, 453; *Barclay v. Bailey*, 2 Camp. 527; *Wilkins v. Jadis*, 2 B. & Ald. 188.]

<sup>3</sup> See § 133.

<sup>4</sup> Pages 515-517. See §§ 136-138. [The language of the Bills of Exchange Act is "or to some person authorized to pay or refuse payment on his behalf if with the exercise of reasonable

diligence such person cannot be found." But this rule appears to be more stringent than that of the law merchant. See *Cromwell v. Hynson*, 2 Camp. 596; *Daniel*, § 590.]

<sup>5</sup> Pages 508-512. "The place of payment may be specified either by the drawer, or by the acceptor [or maker]." *Chalmers*, p. 145. See § 228.

<sup>6</sup> Pages 508-509.

<sup>7</sup> Pages 512-515. [*Gates v. Beecher*, 60 N. Y. 518, 522; *Daniel*, §§ 635, 636.]

<sup>8</sup> Pages 512-515.

ment is demanded, and when it is paid must be delivered up to the party paying it.<sup>9</sup>

[NOTE. — See *Musson v. Lake*, 4 How. 262; *Freeman v. Boynton*, 7 Mass. 483; *Draper v. Clemens*, 7 Mo. 52; Daniel, § 654.]

### § 135. Presentment where instrument payable at bank.

Where the instrument is payable at a bank, presentment for payment must be made during banking hours, unless the person to make payment has no funds there to meet it at any time during the day, in which case presentment at any hour before the bank is closed on that day is sufficient.<sup>10</sup>

### § 136. Presentment where principal debtor is dead.

Where the person primarily liable on the instrument is dead, and no place of payment is specified, presentment for payment must be made to his personal representative, if such there be, and if with the exercise of reasonable diligence, he can be found.<sup>11</sup>

[NOTE. — See Bills of Exchange Act, section 45, subdivision (7); Daniel, § 501.] This is declaratory. (Williams on Executors, 7th ed., p. 2003.) See § 242 (2) and 245 (1), for rule governing presentment for acceptance.

### § 137. Presentment to persons liable as partners.

Where the persons primarily liable<sup>12</sup> on the instrument are liable as partners, and no place of payment is specified, presentment for payment may be made to any one of them, even though there has been a dissolution of the firm.<sup>13</sup>

[NOTE. — See *Hubbard v. Matthews*, 54 N. Y. 43, 50; *Fourth Nat. Bank v. Heuschuk*, 52 Mo. 207; *Crowley v. Barry*, 4 Gill. 194; *Cayuga Co. Bank v. Hunt*, 2 Hill, 635; Daniel on Neg. Inst., sections 592-593.]

### § 138. Presentment to joint debtors.

Where there are several persons not partners, primarily liable on the instrument, and no place of payment is specified, presentment must be made to them all.<sup>14</sup>

[NOTE. — See Bills of Exchange Act, section 45, subdivision (6). *Gates v. Beecher*, 60 N. Y. 518, 523; *Union Bank v. Willis*, 8 Metc. 504; *Arnold v. Dresser*, 8 Allen, 435; *Willis v. Green*, 5 Hill, 232. In some cases this might be impracticable, but such cases are covered by section 82. (N. Y., § 142.) "This is probably declaratory (*Union Bank v. Willis*, 49 Mass. 504), but the point was not clear. Of course, if one pays, or in refusing payment, acts as the agent of the others, that is enough." Chalmers, p. 146.

<sup>9</sup> Page 518. "In England, it is conceived that possession is *prima facie* evidence of identity, and that if the payer doubts the identity of the person presenting, he must pay or refuse payment at his own risk." Chalmers, p. 203.

<sup>10</sup> Pages 495-504.

<sup>11</sup> Pages 516-517.

<sup>12</sup> See § 2.

<sup>13</sup> Page 517.

<sup>14</sup> Pages 517-518.

**§ 139. When presentment not required to charge the drawer.**

Presentment for payment is not required in order to charge the drawer where he has no right to expect or require that the drawee or acceptor will pay the instrument.<sup>15</sup>

[NOTE. — See Bills of Exchange Act, section 46, subdivision (2) (c). *Life Insurance Company v. Pendleton*, 112 U. S. 696; *Daniel*, §§ 1074-1076.] See §§ 185-186.

**§ 140. When presentment not required to charge the indorser.**

Presentment for payment is not required in order to charge an indorser where the instrument was made or accepted for his accommodation, and he has no reason to expect that the instrument will be paid if presented.<sup>16</sup>

[NOTE. — See Bills of Exchange Act, section 46, subdivision (2) (d).] See § 186.

**§ 141. When delay in making presentment is excused.**

Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder and not imputable to his fault, misconduct or negligence. When the cause of delay ceases to operate, presentment must be made with reasonable diligence.<sup>17</sup>

[NOTE. — See Bills of Exchange Act, section 46, subdivision (1).] "The cases do not clearly distinguish between excuses for non-presentment and excuses for delay in presentment, but when the question is one of reasonable diligence the distinction is an important one. (cf. *Allen v. Edmundson*, 2 Exch., at p. 724, notice of dishonor.) If presentment is delayed at the request of the drawer or indorser sought to be charged, the delay is presumably excused. (*Lord Ward v. Oxford R'y Co.*, 2 DeG. M. & G. 750.)" *Chalmers*, p. 149. "Bill drawn in England, payable in Leghorn. At the time the bill matures Leghorn is besieged. The holder is not in Leghorn. This excuses delay. (*Patience v. Townley*, 2 Smith, 223.)" *Ib.*, p. 148.

**§ 142. When presentment may be dispensed with.**

Presentment for payment is dispensed with:

1. Where after the exercise of reasonable diligence presentment as required by this chapter cannot be made;<sup>18</sup>
2. Where the drawee is a fictitious person;<sup>19</sup>
3. By waiver of presentment express or implied.<sup>20</sup>

[NOTE. — See Bills of Exchange Act, section 46, subdivision (2).]

<sup>15</sup> Pages 520-522.

<sup>16</sup> Page 523.

<sup>17</sup> Pages 518-520.

<sup>18</sup> Pages 524-527. The Bills of Exchange Act adds: "The fact that the holder has reason to believe that the bill will, on presentment, be dishonored, does not dispense with the necessity for presentment." *Chalmers* (p. 150), says: "In some American States there is a tendency to dispense

with the attempt to make presentment when such attempt would be futile. (*Foster v. Julien*, 24 N. Y. 28.) This tendency is of doubtful expediency and finds no favor in England."

<sup>19</sup> Page 575, note. This is declaratory. (*Smith v. Bellamy*, 2 Stark. 223.) *Chalmers*, p. 150. See § 185 (2).

<sup>20</sup> On waiver, see §§ 180-182. Pages 527-529.

**§ 143. When instrument dishonored by non-payment.**

The instrument is dishonored by non-payment when :

1. It is duly presented for payment and payment is refused or cannot be obtained; or
2. Presentment is excused and the instrument is overdue and unpaid.

[NOTE. — See Bills of Exchange Act, section 47, subdivision (1).]

**§ 144. Liability of person secondarily liable, when instrument dishonored.**

Subject to the provisions of this chapter,<sup>21</sup> when the instrument is dishonored by non-payment, an immediate right of recourse to all parties secondarily liable<sup>22</sup> thereon, accrues to the holder.<sup>23</sup>

[NOTE. — See Bills of Exchange Act, section 47, subdivision (2).]

**§ 145. Time of maturity.**

Every negotiable instrument is payable at the time fixed therein without grace.\* When the day of maturity falls upon Sunday, or a holiday, the instrument is payable on the next succeeding business day.<sup>24</sup> Instruments falling due on Saturday are to be presented for payment on the next succeeding business day, except that instruments payable on demand may, at the option of the holder, be presented for payment before twelve o'clock noon on Saturday when that entire day is not a holiday.<sup>25</sup>

**§ 146. Time; how computed.**

Where the instrument is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run, and by including the date of payment.

[NOTE. — See Bills of Exchange Act, section 14.] See New York General Construction Law, §§ 20, 30. Cases, p. 504, *note*.

<sup>21</sup> See §§ 280–289.

<sup>22</sup> See § 3.

<sup>23</sup> Pages 442–445. “As a general rule the holder’s right of *action* against a drawer or indorser dates from the time when notice of dishonor is or ought to be received and not from the time when it is sent (*Cartrique v. Bernabo*, 6 Q. B. 498); and in any case there is no right of action till the day after dishonor. The right of recourse must be distinguished from the right of action. (*Kennedy v. Thomas*, 1894, 2 Q. B. 759.)” Chalmers, p. 152.

\* Days of grace are preserved by the Bills of Exchange Act, § 14: “Three days, called days of grace, are, in every case where the bill itself does not otherwise provide, added to the time of payment as fixed by the bill, and the bill is due and payable on the last day of grace.” Cases, pp. 234–236, 504, *note*.

<sup>24</sup> Where days of grace are allowed and the last day of grace is a holiday, the instrument is due on the preceding day. Bills of Exchange Act, § 14.

<sup>25</sup> Pages 504–508.

**§ 147. Rule where instrument payable at bank.**

Where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon.

[NOTE. — *Aetna Nat. Bank v. Fourth Nat. Bank*, 46 N. Y. 82; *Commercial Bank v. Hughes*, 17 Wend. 94; *Commercial Nat. Bank v. Henninger*, 105 Pa. St. 496; *Bedford Bank v. Acoarn*, 125 Ind. 582; *Home Nat. Bank v. Newton*, 8 Bradwell, 563; Contra: *Grissom v. Commercial Bank*, 87 Tenn. 350.]

**§ 148. What constitutes payment in due course.**

Payment is made in due course when it is made at or after the maturity of the instrument to the holder thereof in good faith and without notice that his title is defective.<sup>1</sup>

[NOTE. — See Bills of Exchange Act, section 59.] See § 200.

**ARTICLE IX.****NOTICE OF DISHONOR.**

**SECTION 160.** To whom notice of dishonor must be given.

161. By whom given.
162. Notice given by agent.
163. Effect of notice given on behalf of holder.
164. Effect where notice is given by party entitled thereto.
165. When agent may give notice.
166. When notice sufficient.
167. Form of notice.
168. To whom notice may be given.
169. Notice where party is dead.
170. Notice to partners.
171. Notice to persons jointly liable.
172. Notice to bankrupt.
173. Time within which notice must be given.
174. Where parties reside in same place.
175. Where parties reside in different places.
176. When sender deemed to have given due notice.
177. Deposit in post office, what constitutes.
178. Notice to antecedent party; time of.
179. Where notice must be sent.
180. Waiver of notice.
181. Whom affected by waiver.
182. Waiver of protest.
183. When notice dispensed with.
184. Delay in giving notice; how excused.
185. When notice need not be given to drawer.
186. When notice need not be given to indorser.
187. Notice of non-payment where acceptance refused.
188. Effect of omission to give notice of non-acceptance.
189. When protest need not be made; when must be made.

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<sup>1</sup> Cases, pp. 591-598. See § 2, as to "holder;" § 95, as to "good faith;" § 94, as to defective title.

### § 160. To whom notice of dishonor must be given.

Except as herein otherwise provided,<sup>2</sup> when a negotiable instrument has been dishonored by non-acceptance<sup>3</sup> or non-payment,<sup>4</sup> notice of dishonor must be given to the drawer and to each indorser, and any drawer or indorser to whom such notice is not given is discharged.<sup>5</sup>

[NOTE. — See Bills of Exchange Act, section 48.]

NOTE. — A maker or acceptor is not entitled to presentment (§ 130, *ante*) or notice. Want of notice of dishonor is no defense to a guarantor, unless he is actually injured for want of such notice. *Brown v. Curtis*, 2 N. Y. 225. Cases, p. 467.

### § 161. By whom given.

The notice may be given by or on behalf of the holder, or by or on behalf of any party to the instrument who might be compelled to pay it to the holder, and who, upon taking it up would have a right to reimbursement from the party to whom the notice is given.<sup>6</sup>

[NOTE. — See Bills of Exchange Act, section 49, subdivision (1); Daniel, §§ 987-990. The Bills of Exchange Act uses only the words "holder" and "indorser." But the right extends to any person liable only as a surety, whether he is technically an indorser or not.]

### § 162. Notice given by agent.

Notice of dishonor may be given by an agent either in his own name or in the name of any party entitled to give notice, whether that party be his principal or not.<sup>7</sup>

[NOTE. — See Bills of Exchange Act, section 49, subdivision (2); Daniel, §§ 991, 992, and cases cited.]

### § 163. Effect of notice given on behalf of holder.

Where notice is given by or on behalf of the holder, it enures for the benefit of all subsequent holders and all prior parties who have a right of recourse against the party to whom it is given.<sup>8</sup>

[NOTE. — See Bills of Exchange Act, section 49, subdivision (3); Daniel, § 990.]

<sup>2</sup> See §§ 180-186.

<sup>3</sup> See § 246.

<sup>4</sup> See § 143.

<sup>5</sup> Cases, p. 530. "Where the drawer or indorser of a bill is discharged from his liability thereon by the omission to give him due notice of dishonor, he is also discharged from any liability on the consideration therefor. (*Bridges v. Berry*, 3 Taunt. 130; *Peacock v. Pursell*, 14 C. B. N. S. 728.)" Chalmers, p. 153. For drawer's and indorser's contract, see § 111 and § 116.

<sup>6</sup> Pages 533-538.

<sup>7</sup> Cases, pp. 535-536. "A bill in-

dorsed by C is held by D. D's attorney gives notice of dishonor to the drawer, but by mistake gives it in C's name instead of D's. The notice is sufficient, provided C. is liable to D. and has a right of recourse against the drawer. (*Harrison v. Ruscoe*, 15 M. & W. 231.)" Chalmers, p. 155. "A party entitled to give notice may constitute the drawee or acceptor his agent for the purpose of giving notice of dishonor. (*Rosher v. Kieran*, 4 Camp. 87, as modified by *Harrison v. Ruscoe*, 15 M. & W., at p 235.)" *Ib.*

<sup>8</sup> Pages 534-538.



### § 164. Effect where notice is given by party entitled thereto.

Where notice is given by or on behalf of a party entitled to give notice, it enures for the benefit of the holder and all parties subsequent to the party to whom notice is given.<sup>9</sup>

[NOTE. — See Bills of Exchange Act, section 49, subdivision (4); Daniel, § 990.] “In a New York case it was held that a notice duly sent by the holder did not enure for the benefit of a prior indorser when it did not reach the party to whom it was sent, but the circumstances of the case were somewhat special. (*Beale v. Parish*, 20 N. Y. 407.) The Act does not countenance this view.” Chalmers, pp. 156-7. Chalmers cites *Chapman v. Keane*, 3 A. & E. 193; *Lysaght v. Bryant*, 19 L. J. C. P. 160; *Streeter v. Fort Bank*, 34 N. Y. 413.

### § 165. When agent may give notice.

Where the instrument has been dishonored in the hands of an agent, he may either himself give notice to the parties liable thereon, or he may give notice to his principal. If he give notice to his principal, he must do so within the same time as if he were the holder, and the principal upon the receipt of such notice has himself the same time for giving notice as if the agent had been an independent holder.<sup>10</sup>

[NOTE. — See Bills of Exchange Act, section 49, subdivision (13).] “A bill payable in London is indorsed in blank by the holder, and deposited with a country banker for collection. The country banker’s London agent presents it for payment and gives him due notice of its dishonor. The country banker on the day after the receipt of such notice gives notice to his customer, who in turn gives similar notice to his indorser. The indorser has received due notice. (*Bray v. Hadwen*, 5 M. & S. 68. See also *Clode v. Bayley*, 12 M. & W. 51; *Prince v. Oriental Bank*, L. R. 3 App. Cas., at p. 332.)” Chalmers, p. 162.

### § 166. When notice sufficient.

A written notice need not be signed<sup>11</sup> and an insufficient written notice may be supplemented and validated by verbal communication.<sup>12</sup> A misdescription of the instrument does not vitiate the notice unless the party to whom the notice is given is in fact misled thereby.<sup>13</sup>

[NOTE. — See Bills of Exchange Act, section 49, subdivision (7). Byles on Bills, 276; Daniel, §§ 979a-980. Subdivision (6) of section 49 of the Bills of

<sup>9</sup> Pages 534-538

<sup>10</sup> Page 538.

<sup>11</sup> But it must come from the right person. See §§ 161-162. See *Maxwell v. Brain*, 10 L. T. N. S. 301.

<sup>12</sup> The sufficiency or insufficiency in such case is a question of fact. *Houlditch v. Canty*, 4 Bing. N. C. 411; *Metcalfe v. Richardson*, 11 C. B. 1011.

<sup>13</sup> Pages 539-541. “A notice to the drawer which describes the bill as payable at the ‘S Bank,’ when in fact it

was payable at the ‘T Bank’ (*Bromage v. Vaughan*, 16 L. J. Q. B. 10), or which describes a bill of exchange as a note (*Stockman v. Parr*, 11 M. & W. 809; *Bain v. Gregory*, 14 L. T. N. S. 601), or which transposes the names of the drawer and acceptor (*Mellersh v. Rippen*, 7 Exch. 578), or which describes the acceptor by a wrong name (*Harpham v. Child*, 1 F. & F. 652), may be sufficient.” Chalmers, p. 159.

Exchange Act, which reads "Return of a dishonored bill to the drawer or an indorser is in point of law deemed a sufficient notice of dishonor" is omitted. In his note to that sub-section, Judge Chalmers says: "This sub-section approves a common practice of collecting bankers which was previously of doubtful validity." No such practice prevails in this country.]

### § 167. Form of notice.

The notice may be in writing or merely oral<sup>14</sup> and may be given in any terms which sufficiently identify the instrument, and indicate that it has been dishonored by non-acceptance or non-payment.<sup>15</sup> It may in all cases be given by delivering it personally or through the mails.<sup>16</sup>

### § 168. To whom notice may be given.

Notice of dishonor may be given either to the party himself or to his agent in that behalf.<sup>17</sup>

[NOTE.—See Bills of Exchange Act, section 49, subdivision (8). *Fassin v. Hubbard*, 55 N. Y. 465, 471; *Lake Shore Nat. Bank v. Butler Colliery Co.*, 51 Hun, 63, 68.]

### § 169. Notice where party is dead.

When any party is dead, and his death is known to the party giving notice, the notice must be given to a personal representative, if there be one, and if with reasonable diligence, he can be found.<sup>18</sup> If there

<sup>14</sup> [See Bills of Exchange Act, section 49, subdivision (5); *Cuyler v. Stevens*, 4 Wend. 566; *Glasgow v. Pratte*, 8 Mo. 336; Byles on Bills, 271; Daniel, § 972.]

<sup>15</sup> Cases, pp. 539-542. [Byles on Bills, 976; Daniel, §§ 793-978. The statement that the holder looks for payment to the party to whom notice is sent is not necessary; for this is implied from the fact of giving notice. *Bank of U. S. v. Carneal*, 2 Peters, 543; *Mills v. Bank*, 11 Wheat. 431, 436; *Nelson v. First Nat. Bank* (U. S. Circuit Ct. App.), 69 Fed. Rep. 798, 801.] "Notices of dishonor are now construed very liberally. In 1834 the House of Lords, in *Solarte v. Palmer*, 1 Bing. N. C. 194, decided that the notice must inform the holder, either in terms or by necessary implication, that the bill had been presented and dishonored. This inconvenient decision was frequently regretted (see e. g., *Everard v. Watson*, 1 E. & B., at p. 804), and was eventually got rid of by considering it merely a finding on the particular facts. (*Paul v. Joel*,

27 L. J. Ex., at p. 384.) Since 1841 (see *Furz v. Sharwood*, 2 Q. B. 388, where the notice would now probably be sufficient), it does not appear that any written notice of dishonor has been held bad on the ground of insufficiency in form." Chalmers, p. 158.

<sup>16</sup> Pages 542-546. See §§ 177, 179.

<sup>17</sup> Pages 546-547. "It is the duty of the drawer or indorser of a bill, if he be absent from his place of business or residence, to see that there is some person there to receive notice on his behalf." Chalmers, p. 160, citing *Allen v. Edmundson*, 2 Exch., at p. 723.

<sup>18</sup> Pages 546-547. [See Bills of Exchange Act, section 49, subdivision (9). The statement is based upon the American decisions. *Massachusetts Bank v. Oliver*, 10 Cush. 557; *Merchants' Bank v. Birch*, 17 Johns. 24. See also *Smalley v. Wright*, 40 N. J. Law, 471; *Goodnow v. Warren*, 122 Mass. 82; *Bealls v. Peck*, 12 Barb. 245; *Cayuga Co. Bank v. Bennett*, 5 Hill, 236; *Maspero v. Pedesclaux*, 22 La. Ann. 227.]

be no personal representative, notice may be sent to the last residence or last place of business of the deceased.<sup>19</sup>

### § 170. Notice to partners.

Where the parties to be notified are partners notice to any one partner is notice to the firm even though there has been a dissolution.<sup>20</sup>

### § 171. Notice to persons jointly liable.

Notice to joint parties who are not partners must be given to each of them, unless one of them has authority to receive such notice for the others.<sup>21</sup>

[NOTE. — See Bills of Exchange Act, section 49, subdivision (11). The rule is based upon the American decisions. *Willis v. Green*, 5 Hill, 232. See also *Daniel*, § 999a, and cases cited.]

### § 172. Notice to bankrupt.

Where a party has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, notice may be given either to the party himself or to his trustee or assignee.<sup>22</sup>

[NOTE. — See Bills of Exchange Act, section 49, subdivision (10). *Daniel*, § 1002; *Callahan v. Kentucky Bank*, 82 Ky. 231; *Contra: House v. Vinton Bank*, 43 Ohio St. 346.] “All that had been decided before the Act was that notice given to the bankrupt in ignorance that a trustee had been appointed was sufficient.” *Chalmers*, p. 160.

### § 173. Time within which notice must be given.

Notice may be given as soon as the instrument is dishonored;<sup>23</sup> and unless delay is excused as hereinafter provided, must be given within the times fixed by this chapter.<sup>24</sup>

### § 174. Where parties reside in same place.

Where the person giving and the person to receive notice reside in the same place, notice must be given within the following times:

1. If given at the place of business of the person to receive notice, it must be given before the close of business hours on the day following;<sup>25</sup>

<sup>19</sup> Pages 546-547. [*Goodnow v. Warren*, 122 Mass. 82; *Merchants' Bank v. Birch*, 17 Johns. 25.]

<sup>20</sup> Pages 547-548. [See *Coster v. Thomason*, 19 Ala. 717; *Slocumb v. Lizardi*, 21 La. Ann. 355; *Hubbard v. Matthews*, 54 N. Y. 43, 50; *Fourth Nat. Bank v. Henschuh*, 52 Mo. 207.]

<sup>21</sup> Pages 547-548.

<sup>22</sup> Pages 696-698.

<sup>23</sup> Page 544. [*Bank of Alexandria v. Siran*, 9 Peters, 33; *Lenox v. Roberts*, 2 Wheat. 373; *Ex parte Moline*,

19 Ves. 216; *Daniel*, § 1036.] Bills of Exchange Act, section 49, subdivision (12).

<sup>24</sup> [Bills of Exchange Act, section 49, subdivision (12). The phrase “must be given within a reasonable time thereafter,” used in the Bills of Exchange Act, is omitted; for the time is definitely fixed and this language has no force.]

<sup>25</sup> Pages 548-554. [See *Daniel*, § 1038.]

2. If given at his residence, it must be given before the usual hours of rest on the day following; '

3 If sent by mail, it must be deposited in the post-office in time to reach him in usual course on the day following.<sup>2</sup>

### § 175. Where parties reside in different places.

Where the person giving and the person to receive notice reside in different places, the notice must be given within the following times:

1. If sent by mail, it must be deposited in the post-office in time to go by mail the day following the day of dishonor, or if there be no mail at a convenient hour on that day, by the next mail thereafter.\*

2. If given otherwise than through the post-office, then within the time that notice would have been received in due course of mail, if it had been deposited in the post-office within the time specified in the last subdivision.<sup>3</sup>

### § 176. When sender deemed to have given due notice.

Where notice of dishonor is duly addressed and deposited in the post-office, the sender is deemed to have given due notice, notwithstanding any miscarriage in the mails.<sup>4</sup>

[NOTE. — See Bills of Exchange Act, section 49, subdivision (15); Byles on Bills, 277.]

### § 177. Deposit in post-office; what constitutes.

Notice is deemed to have been deposited in the post-office when deposited in any branch post-office or in any letter box under the control of the post-office department.<sup>5</sup>

<sup>1</sup> Pages 548-554. [See *Phelps v. Stocking*, 21 Neb. 444; *Darbshire v. Parker*, 6 East, 8.]

<sup>2</sup> Cases, p. 556. [This rule is that of the Bills of Exchange Act (§ 49, subsec. 12), and is in accordance with the practice in New York City. Some of the decisions deem service through the post-office insufficient, unless there is proof that the notice was actually received in due time. (See *Daniel*, § 1005, and cases cited.) But this rule would be extremely inconvenient in large places.] See next section.

\* Pages 554-560. [This is substantially the same as the Bill of Exchange Act, section 49, subdivision (12) (b). It is supported by numerous American decisions. See *Daniel*, §§ 1039-1041.]

<sup>3</sup> Pages 560-561.

<sup>4</sup> Pages 545-546. "It lies on the sender to prove that the letter con-

taining the notice was duly addressed and posted. (*Hawkes v. Salter*, 4 Bing. 715; cf. *Skilbeck v. Garbett*, 7 Q. B. 846.) The sufficiency of the direction on the letter is a question of reasonable diligence. If the drawer or indorser has a place of business, the notice should be addressed to him there; if he has not, then it should be addressed to him at his residence, and the party giving notice is bound to use reasonable diligence to discover such place of business or residence. *Ber-ridge v. Fitzgerald*, L. R. 4 Q. B. 639.) When, however, the bill contains an address it seems that such address is in any case sufficient to charge the party giving that address. (*Burmester v. Barron*, 17 Q. B. 828; cf. *Ex parte Baker*, L. R. 4 Ch. D. at p. 799.)"

<sup>5</sup> Pages 545-546.

### § 178. Notice to antecedent party; time of.

Where a party receives notice of dishonor, he has, after the receipt of such notice, the same time for giving notice to antecedent parties that the holder has after the dishonor.<sup>6</sup>

[NOTE. — See Bills of Exchange Act, section 49, subdivision (14); Daniel, § 1044; Byles on Bills, 283.]

### § 179. Where notice must be sent.

Where a party has added an address to his signature, notice of dishonor must be sent to that address;<sup>7</sup> but if he has not given such address, then the notice must be sent as follows:

1. Either to the post-office nearest to his place of residence, or to the post-office where he is accustomed to receive his letters;<sup>8</sup> or

2. If he live in one place and have his place of business in another, notice may be sent to either place;<sup>9</sup> or

3. If he is sojourning in another place, notice may be sent to the place where he is sojourning.<sup>10</sup>

But where the notice is actually received by the party within the time specified in this chapter, it will be sufficient, though not sent in accordance with the requirements of this section.

### § 180. Waiver of notice.

Notice of dishonor may be waived, either before the time of giving notice has arrived, or after the omission to give due notice and the waiver may be express or implied.<sup>11</sup>

[NOTE. — See Bills of Exchange Act, section 50, subdivision (2); Daniel, §§ 1147-1168; Byles on Bills, 293.]

<sup>6</sup> Pages 561-565. See § 165, note.

<sup>7</sup> Pages 565-566. Note to § 176.

<sup>8</sup> Pages 566-571. [See *Bank of Columbia v. Lawrence*, 1 Peters, 578; *National Bank v. Cade*, 73 Mich. 449; *Northwestern Coal Co. v. Bowman*, 69 Iowa, 103.]

<sup>9</sup> Pages 566-571. [*Bank of U. S. v. Carneal*, 2 Peters, 549; *Williams v. Bank of U. S.*, 2 Peters, 96; *Montgomery Co. Bank v. Marsh*, 7 N. Y. 481.]

<sup>10</sup> Pages 571-573.

<sup>11</sup> Pages 580-584. For waiver of presentment see § 142. "Waiver of notice of dishonor in favor of the holder enures for the benefits of parties prior to such holder as well as subsequent holders. (*Rabey v. Gilbert*, 30 L. J. Ex. 170.) Waiver of notice of dishonor by an indorser does not affect parties prior to such indorser. (*Turner*

*Leech*, 4 B. & Ald. 451.) An acknowledgment of liability must be made with full knowledge of the facts in order to operate as a waiver of notice of dishonor. (*Goodall v. Dolley*, 1 T. R. 712; cf. *Pickin v. Graham*, 1 Cr. & M., at p. 729.) Many of the cases fail to distinguish between admissions of liability, which are evidence of due notice having been received, and admissions of liability when due notice has not been given, and which therefore are evidence of waiver. The distinction is important. (As to what is evidence of due notice, see *Taylor v. Jones*, 2 Camp. 105; *Hicks v. Beaufort*, 4 Bing. N. C. 229; *Brownell v. Bonney*, 1 Q. B. 39; *Curlewis v. Corfield*, 1 Q. B. 814; *Campbell v. Webster*, 15 L. J. C. P. 4; *Mills v. Gibson*, 16 L. J. C. P. 249;

### § 181. Whom affected by waiver.

Where the waiver is embodied in the instrument itself, it is binding upon all parties;<sup>12</sup> but where it is written above the signature of an indorser, it binds him only.<sup>13</sup>

### § 182. Waiver of protest.

A waiver of protest, whether in the case of a foreign bill of exchange or other negotiable instrument, is deemed to be a waiver not only of a formal protest, but also of presentment and notice of dishonor.<sup>14</sup>

### § 183. When notice is dispensed with.

Notice of dishonor is dispensed with when, after the exercise of reasonable diligence, it cannot be given to or does not reach the parties sought to be charged.<sup>15</sup>

[NOTE. — See Bills of Exchange Act, section 50, subdivision (2).]

### § 184. Delay in giving notice; how excused.

Delay in giving notice of dishonor is excused when the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, notice must be given with reasonable diligence.<sup>16</sup>

[NOTE. — See Bills of Exchange Act, section 50; Daniel, §§ 1059-1146. A more specific statement of what will excuse delay is deemed impracticable. Any attempt to enumerate particular instances would lead to confusion.]

*Jackson v. Collins*, 17 L. J. Q. B. 142; *Bartholomew v. Hill*, 5 L. T. N. S. 756. As to what is not, *Borradaile v. Lowe*, 4 Taunt. 93; *Braithwaite v. Coleman*, 4 N. & M. 654; *Bell v. Frankis*, 4 M. & G. 446; *Holmes v. Staines*, 3 C. & K. 19.) In America it has been held that a verbal waiver of notice may be revoked before the time for giving notice has expired. (*Second Nat. Bank v. McGuire*, 33 Oh. St. 295.) "Chalmers, pp. 166-7.

<sup>12</sup> Page 581n. [See *Pool v. Anderson*, 116 Ind. 94; *Bryant v. Merchants' Bank*, 8 Bush, 43.]

<sup>13</sup> [*Woodman v. Thurston*, 8 Cush. 157; *Farmers' Bank v. Ewing*, 78 Ky. 264.] "Such an indorsement is sometimes spoken of as a facultative indorsement. It relates only to the indorser's liability, and does not otherwise affect the negotiation of the bill. Such stipulations are resorted to when

the payment of the bill is doubtful, and the drawer or indorser wishes to save expense in case of its return. In the United States it has been held that an indorsement in the above form dispenses with the necessity of notice to all subsequent indorsers (*Daniel*, § 1090; *Parshley v. Heath*, 69 Me. 90); and in France a similar construction has been put on the phrases '*Retour sans frais*,' '*Retour sans protêt*,' and '*sans compte de retour*.' (*Nouguier*, § 259; German Exchange Law, art. 42, seems ambiguous). It is doubtful whether the English Act would bear such an interpretation." Chalmers, p. 40.

The above section fixes the law contrary to *Parshley v. Heath*, *supra*.

<sup>14</sup> Pages 584-586.

<sup>15</sup> Page 580.

<sup>16</sup> Pages 573-574.

### § 185. When notice need not be given to drawer.

Notice of dishonor is not required to be given to the drawer in either of the following cases:

1. Where the drawer and drawee are the same person;<sup>17</sup>
2. Where the drawee is a fictitious person or a person not having capacity to contract;<sup>17</sup>
3. Where the drawer is the person to whom the instrument is presented for payment;<sup>17</sup>
4. Where the drawer has no right to expect or require that the drawee or acceptor will honor the instrument;<sup>18</sup>
5. Where the drawer has countermanded payment.<sup>19</sup>

### § 186. When notice need not be given to indorser.

Notice of dishonor is not required to be given to an indorser in either of the following cases:

1. Where the drawee is a fictitious person or a person not having capacity to contract, and the indorser was aware of the fact at the time he indorsed the instrument;<sup>20</sup>
2. Where the indorser is the person to whom the instrument is presented for payment;<sup>21</sup>
3. Where the instrument was made or accepted for his accommodation.<sup>22</sup>

[NOTE. — See Bills of Exchange Act, section 50, subdivision (2) (d).]

### § 187. Notice of non-payment where acceptance refused.

Where due notice of dishonor by non-acceptance has been given, notice of a subsequent dishonor by non-payment is not necessary, unless in the meantime the instrument has been accepted.<sup>23</sup>

[NOTE. — See Bills of Exchange Act, section 48, subdivision (2); Daniel, § 932.]

### § 188. Effect of omission to give notice of non-acceptance.

An omission to give notice of dishonor by non-acceptance does not prejudice the rights of a holder in due course subsequent to the omission.<sup>24</sup>

[NOTE. — See Bills of Exchange Act, section 48, subdivision (1).]

<sup>17</sup> Pages 575-576n. [See Bills of Exchange Act, section 50, subdivision (2) (c); Daniel, §§ 128-129, 1088a.] See "person" defined, § 2.

<sup>18</sup> Pages 576-577. [*Life Insurance Company v. Pendleton*, 112 U. S. 708; Daniel, §§ 1074, 1076. The language of the Bills of Exchange Act is "where the drawee or acceptor is as between himself and the drawer under no obligation to accept or pay the bill." But this is too narrow. It is not required

that there should be any obligation to accept. See *Adams v. Darby*, 28 Mo. 162; *Dickens v. Beal*, 10 Peters, 572.]  
<sup>19</sup> [*Sutcliffe v. McDowell*, 2 Nott. & M'C. 251; Daniel, § 1081.]

<sup>20</sup> See preceding section, note 17.

<sup>21</sup> Pages 577-579. See preceding section, note 17.

<sup>22</sup> Page 579.

<sup>23</sup> Page 586.

<sup>24</sup> Pages 587-589.

**§ 189. When protest need not be made; when must be made.**

Where any negotiable instrument has been dishonored it may be protested for non-acceptance or non-payment, as the case may be; but protest is not required, except in the case of foreign bills of exchange.<sup>25</sup>

[NOTE. — See Bills of Exchange Act, section 51, subdivision (1); Daniel, §§ 926, 928; Byles on Bills, 260. For the other provisions relative to protests see sections 152 and 160. (N. Y., §§ 260 and 268.)]

Pages 589-590.

**ARTICLE X.****DISCHARGE.****SECTION 200. Instrument; how discharged.**

201. When persons secondarily liable on, discharged.
202. Right of party who discharges instrument.
203. Renunciation by holder.
204. Cancellation; unintentional; burden of proof.
205. Alteration of instrument; effect of.
206. What constitutes a material alteration.

**§ 200. Instrument; how discharged.**

A negotiable instrument is discharged:

1. By payment in due course by or on behalf of the principal debtor;<sup>1</sup>
2. By payment in due course by the party accommodated, where the instrument is made or accepted for accommodation;<sup>2</sup>
3. By the intentional cancellation thereof by the holder;<sup>3</sup>
4. By any other act which will discharge a simple contract for the payment of money;<sup>4</sup>
5. When the principal debtor becomes the holder of the instrument at or after maturity in his own right.<sup>5</sup>

[NOTE. — See Bills of Exchange Act, sections 59, 61, 63.]

**§ 201. When persons secondarily liable on, discharged.**

A person secondarily liable on the instrument is discharged:

1. By any act which discharges the instrument;<sup>6</sup>
2. By the intentional cancellation of his signature by the holder;<sup>7</sup>
3. By the discharge of a prior party;<sup>8</sup>
4. By a valid tender of payment made by a prior party;<sup>9</sup>

<sup>25</sup> Pages 589-590.

<sup>1</sup> Pages 591-597. See § 148.

<sup>2</sup> Pages 597-598. See § 55.

<sup>3</sup> Pages 599-608. See § 204.

<sup>4</sup> Pages 608-626, 637.

<sup>5</sup> Pages 597-598. See § 80.

<sup>6</sup> See preceding section.

<sup>7</sup> Pages 626-627. See § 78. [See Bills of Exchange Act, section 63.]

<sup>8</sup> Pages 627-628. [Daniel, § 1307.]

<sup>9</sup> Page 629.



5. By a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved;<sup>10</sup>

6. By any agreement binding upon the holder to extend the time of payment or to postpone the holder's right to enforce the instrument, unless the right of recourse against such party is expressly reserved.<sup>11</sup>

### § 202. Right of party who discharges instrument.

Whenever the instrument is paid by a party secondarily liable thereon, it is not discharged; but the party so paying it is remitted to his former rights as regards all prior parties, and he may strike out his own and all subsequent indorsements, and again negotiate the instrument, except:

1. Where it is payable to the order of a third person, and has been paid by the drawer;<sup>12</sup> and

2. Where it was made or accepted for accommodation, and has been paid by the party accommodated.<sup>13</sup>

[NOTE. — See Bills of Exchange Act, section 59; Daniel, §§ 1235a-1241.] This section is, perhaps, not altogether clear. Exception (1) qualifies the last clause beginning "and he may strike out," etc., while exception (2) qualifies the whole of the preceding statement. If the instrument is paid by the party accommodated, it is discharged under the provisions of § 200 (1). If paid by a drawer of a bill payable to the order of a third person, the drawer (not being an accommodated party), may enforce payment against the acceptor but may not re-issue the bill. If paid by an indorser, or by a drawer of a bill payable to drawer's order, the party paying (not being an accommodated party), may enforce payment against prior parties or may strike out his own and subsequent indorsements, and re-issue the instrument.

### § 203. Renunciation by holder.

The holder may expressly renounce his rights against any party to the instrument, before, at or after its maturity. An absolute and unconditional renunciation of his rights against the principal debtor made at or after the maturity of the instrument, discharges the instrument. But a renunciation does not affect the rights of a holder in due course without notice. A renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon.<sup>14</sup>

[NOTE. — See Bills of Exchange Act, section 62; Byles on Bills, 190, 191; Daniel, §§ 541-545. The Bills of Exchange Act requires the renunciation to be "in writing, unless the bill is delivered to the acceptor." But this effected a change in the law.] "The words requiring the renunciation to be in writing were added in committee. They alter the English law, but bring it into accordance with the Scotch law. At common law a contract cannot

<sup>10</sup> Pages 629-631. [Daniel, § 1310.]

<sup>11</sup> Pages 631-638. [Daniel, §§ 1326-1388a.]

<sup>12</sup> Pages 639-640.

<sup>13</sup> Pages 640-641. See § 55.

<sup>14</sup> Pages 599-604.

be discharged by accord without satisfaction. The special rule as to bills and notes partially reproduced in this section seems to have been consciously imported into the law merchant from French law. (See Parke, B., in *Foster v. Dawber*, 6 Exch., at p. 852.) This mode of discharge is known in France as 'remise volontaire,' and is recognized in countries where the civil law is followed. (See Nouguiet, §§ 1043-1052.)" Chalmers, p. 212.

### § 204. Cancellation; unintentional; burden of proof.

A cancellation made unintentionally, or under a mistake, or without the authority of the holder, is inoperative; but where an instrument or any signature thereon appears to have been canceled the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake or without authority.<sup>15</sup>

[NOTE. — See Bills of Exchange Act, section 63, subdivision (3).] Chalmers cites: *Raper v. Birkbeck*, 15 East, 17; *Wilkinson v. Johnson*, 3 B. & C. 428; *Novelli v. Rossi*, 2 B. & Ad. 757; *Castrique v. Imrie*, L. R. 4 H. L. 435; *Warwick v. Rogers*, 5 M. & Gr. 340 and 373; *Prince v. Oriental Bank*, L. R. 3 App. Cas. 325; *Dominion Bank v. Anderson*, 15 Sess. Cas. 408.

### § 205. Alteration of instrument; effect of.

Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided, except as against a party who has himself made, authorized or assented to the alteration and subsequent indorsers.<sup>16</sup> But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor.<sup>17</sup>

[NOTE. — See Bills of Exchange Act, section 64, subdivision (1); Daniel, §§ 1393-1421a.

The Bills of Exchange Act contains a provision that "where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as

<sup>15</sup> Pages 605-608, 626-627.

<sup>16</sup> Pages 608-626.

<sup>17</sup> Pages 157, 625, 726. "The proviso was introduced in committee to mitigate the rigor of the common-law rule in favor of a holder in due course. \* \* \* At common law a material alteration, by whomsoever made (*Davidson v. Cooper*, 11 M. & W. at p. 799; aff'd 13 M. & W. 343), avoided and discharged the bill, except as against a party who made or assented to the alteration. (*Hamelin v. Bruck*, 9 Q. B. 306.) Thus where a bill was altered by adding a place of payment without the acceptor's consent, and was subsequently indorsed to

a holder in due course, it was laid down that the holder could not sue the indorser on the bill, for the instrument was discharged. (*Burchfield v. Moore*, 23 L. J. Q. B. 261.) He could only sue on the consideration. In America the rule is not quite so severe, and it is held that an alteration by a stranger, or, as it is called, 'an act of spoliation,' does not avoid a bill. (*Parsons on Bills*, vol. II., p. 574; cf. *U. S. v. Spalding*, 2 Mason, 482; *Dinsmore v. Duncan*, 57 N. Y. 581.)" Chalmers, p. 214. But see pages 614-616 for the effect of § 205 upon the American rule.

if it had not been altered, and may enforce payment of it according to its original tenor." But this effects a change in the law.] This change was subsequently adopted by the Commissioners on Uniformity of Laws, and is introduced in substance above.

## § 206. What constitutes a material alteration.

Any alteration which changes :

1. The date ;<sup>18</sup>
2. The sum payable, either for principal<sup>19</sup> or interest ;<sup>20</sup>
3. The time<sup>21</sup> or place<sup>22</sup> of payment ;
4. The number or the relations of the parties ;<sup>23</sup>
5. The medium or currency in which payment is to be made ;<sup>24</sup>

Or which adds a place of payment where no place of payment is specified,<sup>25</sup> or any other change or addition which alters the effect of the instrument in any respect, is a material alteration.<sup>1</sup>

[NOTE. — See Bills of Exchange Act, section 64.] Pages 608–626.

<sup>18</sup> [See *Wood v. Steele*, 6 Wallace, 80; *Crawford v. West Side Bank*, 100 N. Y. 50, 56; *Daniel*, § 1376.] See § 32.

<sup>19</sup> [See *Daniel*, § 1384.]

<sup>20</sup> [*Daniel*, § 1385, and cases there cited.]

<sup>21</sup> [*Weyman v. Yeomans*, 84 Ill. 403; *Miller v. Gilleland*, 19 Pa. St. 119.]

<sup>22</sup> [*Tidmarsh v. Grover*, 1 Maule & S. 735; *Bank of Ohio Valley v. Lockwood*, 13 W. Va. 392.]

<sup>23</sup> [*Daniel*, §§ 1387–1390.]

<sup>24</sup> [*Angle v. Insurance Company*, 92 U. S. 330; *Church v. Howard*, 17 Hun, 5; *Darwin v. Rippey*, 63 N. C. 318; *Bagarth v. Breedlove*, 39 Tex. 561.]

<sup>25</sup> [*Whitesides v. Northern Bank*, 10 Bush, 501.]

<sup>1</sup> Distinguish authorized filling of blanks: § 33.

"An alteration is material which in any way alters the operation of the bill and the liabilities of the parties, whether the change be prejudicial or beneficial (*Gardner v. Walsh*, 5 E. & B. 83, at p. 89); and it may be that even this test is not wide enough. 'Any alteration,' says Brett, L. J., 'seems to me material which would alter the business effect of the instrument, if used for any business purpose.' (*Suffel v. Bank of England*, 9 Q. B. D. 555, at p. 568; see the test suggested by Cotton, L. J., at pp. 574, 575.) The materiality of any alter-

ation is a question of law. (*Vance v. Lowther*, 1 Ex. D. 176.)

"Subject to two exceptions the holder of a bill, which has been avoided by a material alteration, cannot sue on the consideration in respect of which it was negotiated to him. (*Alderson v. Langdale*, 3 B. & Ad. 660.) *Exception 1.* If the bill was negotiated to him after the alteration was made, and he was not privy to the alteration, he may sue on the consideration. (*Burchfield v. Moore*, 23 L. J. Q. B. 261; cf. *Cundy v. Marriott*, 1 B. & Ad. 696.) *Exception 2.* If the bill was altered while in his custody or under his control, he can still recover, provided (a) that he did not intend to commit a fraud by the alteration (*Parsons*, vol. II., p. 572; *Hunt v. Gray*, 35 N. J. L. 227), and (b), that the party sued would not have had any remedy over on the bill, if it had not been altered. (*Atkinson v. Hawdon*, 2 A. & E. 628; cf. *Sutton v. Toomer*, 7 B. & C. 416; *Alderson v. Langdale*, 3 B. & Ad. 660.)

"When a bill appears to have been altered, or there are marks of erasures on it, the party seeking to enforce the instrument is bound to give evidence to show that it is not avoided thereby. (*Knight v. Clements*, 8 A. & E. 215; *Clifford v. Parker*, 2 M. & Gr. 909.)" Chalmers, pp. 217–218.

## ARTICLE XI.

## BILLS OF EXCHANGE; FORM AND INTERPRETATION.

**SECTION 210.** Bill of exchange defined.

211. Bill not an assignment of funds in hands of drawee.

212. Bill addressed to more than one drawee.

213. Inland and foreign bills of exchange.

214. When bill may be treated as promissory note.

215. Referee in case of need.

**§ 210. Bill of exchange defined.**

A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to order or to bearer.

[NOTE. — See section 1 (N. Y. 20); Bills of Exchange Act, section 3.]

“A bill is sometimes called a draft, and an accepted bill is often referred to as ‘an acceptance.’ The person who gives the order is called the drawer. The person thereby ordered to pay is called the drawee, and if he signifies his assent to the order in due form [see § 220], he is then called the acceptor. The person to whom the money is payable is called the payee or bearer, as the case may be. [See § 2.] The foreign codes for the most part provide in terms that a bill may be drawn by one person for the account of another. The person for whose account the bill is drawn is spoken of in England as the ‘third account.’ For example, a merchant in America may direct his agent in England to draw on a correspondent in Paris for his (the principal’s) account.” Chalmers, p. 8.

**§ 211. Bill not an assignment of funds in hands of drawee.**

A bill of itself does not operate as an assignment of the funds in the hands of the drawee available for the payment thereof, and the drawee is not liable on the bill unless and until he accepts the same.<sup>2</sup>

[NOTE. — See Bills of Exchange Act, section 53.]

**§ 212. Bill addressed to more than one drawee.**

A bill may be addressed to two or more drawees jointly, whether they are partners or not; but not to two or more drawees in the alternative or in succession.<sup>3</sup>

[NOTE. — See Bills of Exchange Act, section 6, subdivision (2).] See § 229 (5), and § 242 (1).

<sup>2</sup> Pages 644–646.

<sup>3</sup> Pages 642–643. “Though a bill may not be addressed to two drawees in succession, or in the alternative, it may name a drawee in case of need [§ 215]; but his status is wholly different from that of an ordinary drawee. Alternative or successive

drawees would give rise to difficulty as to the recourse if the bill was dishonored. The difficulty does not arise in the case of a note, consequently the makers of a note may be liable jointly, or jointly and severally, according to its tenor, while the acceptors of a bill can only be liable jointly. A note pay-

### § 213. Inland and foreign bills of exchange.

An inland bill of exchange is a bill which is, or on its face purports to be, both drawn and payable within this state. Any other bill is a foreign bill. Unless the contrary appears on the face of the bill, the holder may treat it as an inland bill.<sup>4</sup>

[NOTE. — See Bills of Exchange Act, section 4, subdivision (1); *Buckner v. Finley*, 2 Peters, 586; *Strawbridge v. Robinson*, 5 Gilman, 470.]

### § 214. When bill may be treated as promissory note.

Where in a bill drawer and drawee are the same person, or where the drawee is a fictitious person, or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or a promissory note.<sup>5</sup>

[NOTE. — See Bills of Exchange Act, section 5, subdivision (2).] See § 36 (5). "If both drawer and drawee are fictitious persons the bill might, perhaps, be treated as a note made by the first indorser." Chalmers, p. 18.

### § 215. Referee in case of need.

The drawer of a bill and any indorser may insert thereon the name of a person to whom the holder may resort in case of need, that is to say, in case the bill is dishonored by non-acceptance or non-payment. Such person is called the referee in case of need. It is the option of the holder to resort to the referee in case of need or not as he may see fit.

[NOTE. — See Bills of Exchange Act, section 15; Daniel, §§ 111, 529.]

"The referee in case of need is sometimes called the drawee in case of need, or simply the 'case of need.' A bill must be protested or noted for protest before it can be presented to the case of need. [See §§ 280, 286.] The concluding words of the section settle the moot point, whether presentment to the case of need is obligatory or optional." — Chalmers, p. 38.

Pages 643-645.

## ARTICLE XII.

### ACCEPTANCE.

#### SECTION 220. Acceptance, how made.

221. Holder entitled to acceptance on face of bill.

222. Acceptance by separate instrument.

223. Promise to accept; when equivalent to acceptance.

224. Time allowed drawee to accept.

225. Liability of drawee retaining or destroying bill.

226. Acceptance of incomplete bill.

227. Kinds of acceptances.

228. What constitutes a general acceptance.

229. Qualified acceptance.

230. Rights of parties as to qualified acceptance.

able in the alternative by one of two makers is invalid. (*Ferrie v. Bond*, 4 B. & Ald. 679.)" Chalmers, p. 19.

<sup>4</sup> Pages 646-647.

<sup>5</sup> Page 647.

### § 220. Acceptance; how made.

The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. The acceptance must be in writing and signed by the drawee.<sup>6</sup> It must not express that the drawee will perform his promise by any other means than the payment of money.<sup>7</sup>

### § 221. Holder entitled to acceptance on face of bill.

The holder of a bill presenting the same for acceptance may require that the acceptance be written on the bill, and if such request is refused, may treat the bill as dishonored.

[NOTE. — 1 N. Y. Rev. Stat., 768, section 9.] The English Act requires that the acceptance be written on the bill; the American Act leaves it optional with the holder to require it, or to waive it. This permits acceptances by telegraph. *Garretson v. North Atchinson Bank*, 39 Fed. Rep. 113, 47 Fed. Rep. 867, 51 Fed. Rep. 168.

### § 222. Acceptance by separate instrument.

Where an acceptance is written on a paper other than the bill itself, it does not bind the acceptor except in favor of a person to whom it is shown and who, on the faith thereof, receives the bill for value.<sup>8</sup>

[NOTE. — 1 N. Y. Rev. Stat. 768, section 7.]

### § 223. Promise to accept; when equivalent to acceptance.

An unconditional promise in writing to accept a bill before it is drawn is deemed an actual acceptance in favor of every person who, upon the faith thereof, receives the bill for value.<sup>9</sup>

[NOTE. — 1 N. Y. Rev. Stat. 768, section 8.]

### § 224. Time allowed drawee to accept.

The drawee is allowed twenty-four hours after presentment in which to decide whether or not he will accept the bill;<sup>10</sup> but the acceptance if given dates as of the day of presentation.<sup>11</sup>

### § 225. Liability of drawee retaining or destroying bill.

Where a drawee to whom a bill is delivered for acceptance destroys the same, or refuses within twenty-four hours after such delivery,

<sup>6</sup> Pages 648-649. [See Bills of Exchange Act, section 17; 1 N. Y. Rev. Stat., 768, § 6. The Bills of Exchange Act, following previous English statutes (1 & 2 George IV., c. 78; 19 & 20 Victoria, c. 78) requires that the acceptance be written on the bill. The American statutes do not generally require this.] See next two sections.

<sup>7</sup> [See Bills of Exchange Act, section 17, subdivision (2) (b).] See § 20.

<sup>8</sup> Pages 651-657.  
<sup>9</sup> Pages 651-657.

<sup>10</sup> Pages 660-665. [See Byles on Bills, 182; Daniel, § 492.]

<sup>11</sup> [There does not appear to be any direct authority on this point; the rule stated conforms to what is the common practice.]

or within such other period as the holder may allow, to return the bill accepted or non-accepted to the holder, he will be deemed to have accepted the same.<sup>12</sup>

[NOTE. — 1 N. Y. Rev. Stat. 769, section 11; see Daniel, § 500.]

### § 226. Acceptance of incomplete bill.

A bill may be accepted before it has been signed by the drawer, or while otherwise incomplete,<sup>13</sup> or when it is overdue, or after it has been dishonored by a previous refusal to accept, or by non-payment.<sup>14</sup> But when a bill payable after sight is dishonored by non-acceptance and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill accepted as of the date of the first presentment.<sup>15</sup>

[NOTE. — See Bills of Exchange Act, section 18; Daniel, §§ 490-495.]

### § 227. Kinds of acceptances.

An acceptance is either general or qualified. A general acceptance assents without qualification to the order of the drawer.<sup>16</sup> A qualified acceptance in express terms varies the effect of the bill as drawn.<sup>17</sup>

[NOTE. — See Bills of Exchange Act, section 19; Byles on Bills, 193; Daniel, § 509 *et seq.*]

### § 228. What constitutes a general acceptance.

An acceptance to pay at a particular place is a general acceptance unless it expressly states that the bill is to be paid there only and not elsewhere.<sup>18</sup>

[NOTE. — See Bills of Exchange Act, section 19, subdivision (2); *Wallace v. McConnell*, 13 Peters, 136; Daniel, §§ 519-520, 641-643.]

<sup>12</sup> Pages 658-665.

<sup>13</sup> Pages 666-667. See § 33.

<sup>14</sup> Pages 667-668. Chalmers cites *Mutford v. Walcot*, 1 Ld. Raym. 574; *Wynne v. Raikes*, 5 East, 514.

<sup>15</sup> "This subsection was added in committee. It accords with mercantile practice, and was intended to secure that, apart from special agreement, the holder should be put, as far as possible, in the same position as if the bill had not been dishonored. Unless the contrary appear by its terms, a bill of exchange is *prima facie* deemed to have been accepted before maturity and within a reasonable time after its issue, but there is no presumption as to the exact time of acceptance. (*Roberts v. Bethell*, 12 C. B. 778.)" Chalmers, p. 45.

<sup>16</sup> Pages 668-672. "An acceptance

is, whenever possible, to be construed as general, not qualified; and a mere memorandum, such as a wrong due date, inconsistent with such construction, has been rejected as being no part of the acceptance. (*Fanshawe v. Peet*, 26 L. J. Ex. 314; cf. *Stone v. Metcalfe*, 4 Camp. 217; *Fitch v. Jones*, 5 E. & B., at p. 246; *Decroix v. Meyer*, 25 Q. B. D. 343.)" Chalmers, p. 46.

<sup>17</sup> See § 229.

<sup>18</sup> Pages 672-673. "This subsection reproduces the effect of the repealed 1 & 2 Geo. 4, c. 78, which was passed to override the case of *Rowe v. Young*, 2 Brod. & Bing. 165; s. c. 2 Bligh. H. L. 391, where it was held that an ordinary acceptance payable at a banker's was a qualified acceptance." Chalmers, p. 48.

### § 229. Qualified acceptance.

An acceptance is qualified, which is:

1. Conditional, that is to say, which makes payment by the acceptor dependent on the fulfillment of a condition therein stated;<sup>19</sup>
2. Partial, that is to say, an acceptance to pay part only of the amount for which the bill is drawn;<sup>20</sup>
3. Local, that is to say, an acceptance to pay only at a particular place;<sup>21</sup>
4. Qualified as to time;<sup>22</sup>
5. The acceptance of some one or more of the drawees, but not of all.<sup>23</sup>

[NOTE. — See Bills of Exchange Act, section 19, subdivision (2); Byles on Bills, 193-194; Daniel, §§ 508-520.]

### § 230. Rights of parties as to qualified acceptance.

The holder may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance, he may treat the bill as dishonored by non-acceptance.<sup>24</sup> Where a qualified acceptance is taken, the drawer and indorsers are discharged from liability on the bill, unless they have expressly or impliedly authorized the holder to take a qualified acceptance, or subsequently assent thereto.<sup>25</sup> When the drawer or an indorser receives notice of a qualified acceptance, he must within a reasonable time express his dissent to the holder, or he will be deemed to have assented thereto.<sup>1</sup>

[NOTE. — See Bills of Exchange Act, section 44; Byles on Bills, 192-193; Daniel, §§ 508, 510.]

The Bills of Exchange Act provides that the provisions relative to the assent of the drawer and indorser do not apply "to partial acceptance whereof due notice has been given," and that "where a foreign bill has been accepted as to part, it must be protested as to the balance." But there appears to be some doubt whether this correctly states the rule of the law merchant. See Daniel, § 511; Story on Bills, section 272.]

<sup>19</sup> Pages 673-674.

<sup>20</sup> Page 675.

<sup>21</sup> Pages 675-676. See § 228.

<sup>22</sup> Page 676.

<sup>23</sup> Page 676. "Bill drawn on B, X and Y. B accepts, X and Y refuse to accept. This is a qualified acceptance." Chalmers (p. 48), citing Marius, No. 16; New York Draft Code, § 1784; Nougier, § 451.

<sup>24</sup> Page 677. "According to the

continental codes, it seems that the holder cannot refuse a partial acceptance. He can only protest as to the balance. (French Code, arts. 119-120; German Exchange Law, arts. 25-28.)" Chalmers, p. 140.

<sup>25</sup> Pages 677-678.

<sup>1</sup> "This subsection settles a doubtful point in favor of the holder. See subject discussed in *Rowe v. Young*, 2 Bligh. 391." Chalmers, p. 141.



## ARTICLE XIII.

## PRESENTMENT FOR ACCEPTANCE.

**SECTION 240.** When presentment for acceptance must be made.

- 241. When failure to present releases drawer and indorser.
- 242. Presentment; how made.
- 243. On what days presentment may be made.
- 244. Presentment; where time is insufficient.
- 245. When presentment is excused.
- 246. When dishonored by non-acceptance.
- 247. Duty of holder where bill not accepted.
- 248. Rights of holder where bill not accepted.

**§ 240. When presentment for acceptance must be made.**

Presentment for acceptance must be made:

1. Where the bill is payable after sight, or in any other case where presentment for acceptance is necessary in order to fix the maturity of the instrument;<sup>2</sup> or

2. Where the bill expressly stipulates that it shall be presented for acceptance;<sup>3</sup> or

3. Where the bill is drawn payable elsewhere than at the residence or place of business of the drawee.<sup>4</sup>

In no other case is presentment for acceptance necessary in order to render any party to the bill liable.<sup>5</sup>

**§ 241. When failure to present releases drawer and indorser.**

Except as herein otherwise provided, the holder of a bill which is required by the next preceding section to be presented for acceptance must either present it for acceptance or negotiate it within a reasonable time.<sup>6</sup> If he fails to do so, the drawer and all indorsers are discharged.<sup>7</sup>

[NOTE. — See Bills of Exchange Act, section 40, subdivision (1); *Wallace v. Agry*, 4 Mason, 333; Daniel, §§ 469-472.]

<sup>2</sup> Pages 679-680. [See Bills of Exchange Act, section 39, subdivision (1); Daniel, § 454.]

<sup>3</sup> [See Bills of Exchange Act, section 39, subdivision (2).]

<sup>4</sup> [*Id.*] See § 244.

<sup>5</sup> Pages 680-684. "Where presentment is optional, the object of presenting is (1), to obtain the acceptance of the drawee, and thereby secure his liability as a party to the bill; (2), to obtain an immediate right of recourse against antecedent parties in case the bill is dishonored by non-ac-

ceptance. An agent is bound to use due diligence in presenting for acceptance, even when presentment is optional for the purposes of the Act, and he is liable to his principal for damages resulting from his negligence. (Pothier, No. 128; Nouguiet, § 462; *Allen v. Suydam*, 20 Wend. 321; *Bank of Van Diemen's Land v. Victoria Bank*, L. R. 3 P. C. at p. 542.)" Chalmers, p. 132.

<sup>6</sup> See § 4.

<sup>7</sup> Pages 681-684.

### § 242. Presentment; how made.

Presentment for acceptance must be made by or on behalf of the holder at a reasonable hour,<sup>8</sup> on a business day, and before the bill is overdue,<sup>9</sup> to the drawee or some person authorized to accept or refuse acceptance on his behalf;<sup>10</sup> and

1. Where a bill is addressed to two or more drawees who are not partners, presentment must be made to them all, unless one has authority to accept or refuse acceptance for all, in which case presentment may be made to him only;<sup>11</sup>

2. Where the drawee is dead, presentment may be made to his personal representative;<sup>12</sup>

3. Where the drawee has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, presentment may be made to him or to his trustee or assignee.<sup>13</sup>

[NOTE. — See Bills of Exchange Act, section 41, subdivision (1).]

### § 243. On what days presentment may be made.

A bill may be presented for acceptance on any day on which negotiable instruments may be presented for payment under the provisions of sections one hundred and thirty-two and one hundred and forty-five of this chapter. When Saturday is not otherwise a holiday, presentment for acceptance may be made before twelve o'clock noon on that day.

### § 244. Presentment where time is insufficient.

Where the holder of a bill drawn payable elsewhere than at the place of business or the residence of the drawee has not time with the exercise of reasonable diligence to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused and does not discharge the drawers and indorsers.

[NOTE. — See Bills of Exchange Act, section 39, subdivision (4).]

This section is rendered necessary by § 240, subsec. 3, *ante*. "It settles a moot point, and perhaps alters the law. Suppose a bill, payable one month after date, is drawn in New York on a Liverpool firm, but payable at a London

<sup>8</sup> See § 132 (2). [See Daniel, § 462. Now the holder has an option." 464a.] (See § 245 [1]) Chalmers, p. 136n.

<sup>9</sup> See *Plato v. Reynolds*, 27 N. Y. 586, *ante*, p. 680. <sup>13</sup> [The Bills of Exchange Act provides that, "Where authorized by

<sup>10</sup> Pages 685-688. [Byles on Bills, 182; Daniel, § 487.] agreement or usage a presentment through the post office is sufficient."

<sup>11</sup> [Daniel, § 488.] *Ante*, § 229 (5). But probably no such practice prevails

<sup>12</sup> [Daniel, § 591.] "Before this enactment the law on this point was very doubtful. *Smith v. New South Wales Bank*, 8 Moore, P. C. N. S., at pp. 461, in this country, nor does it appear to be a practice that should be encouraged.]

bank. It only reaches the English holder, or his agent, on the day that it matures. He must, nevertheless, present it for acceptance to the drawees in Liverpool. The Act provides that he shall not be prejudiced by so doing. Before the act the usual practice was to protest the bill in London without any presentment to the drawees—an obviously inconvenient mode of proceeding, for the holder's object is to get the bill paid, and not to run up expenses against the drawer and indorsers." Chalmers. p. 133.

### § 245. When presentment is excused.

Presentment for acceptance is excused and a bill may be treated as dishonored by non-acceptance in either of the following cases:

1. Where the drawee is dead,<sup>14</sup> or has absconded,<sup>15</sup> or is a fictitious person or a person not having capacity to contract by bill;<sup>16</sup>
2. Where after the exercise of reasonable diligence, presentment cannot be made;<sup>17</sup>
3. Where although presentment has been irregular, acceptance has been refused on some other ground.<sup>18</sup>

### § 246. When dishonored by non-acceptance.

A bill is dishonored by non-acceptance:

1. When it is duly presented for acceptance, and such an acceptance as is prescribed by this chapter is refused or cannot be obtained; or
2. When presentment for acceptance is excused and the bill is not accepted.

[NOTE. — See Bills of Exchange Act, section 43, subdivision (1).]

### § 247. Duty of holder where bill not accepted.

Where a bill is duly presented for acceptance and is not accepted within the prescribed time, the person presenting it must treat the bill as dishonored by non-acceptance or he loses the right of recourse against the drawer and indorsers.<sup>19</sup>

[NOTE. — See Bills of Exchange Act, section 42. The language of the Bills of Exchange Act is, "within the customary time," but the time herein is fixed by section 136. (N. Y., § 224.)] That is, due notice must be given to parties secondarily liable. See, however, § 188.

<sup>14</sup> [See Bills of Exchange Act, section 41, subdivision (2); Daniel, § 1178.] Compare § 242, subsec 2.

<sup>15</sup> [Daniel, § 1144. By the Bills of Exchange Act the bankruptcy of the drawee will excuse presentment for acceptance. But this is not the rule of the Commercial Law. Daniel, §§ 1171-1172.]

<sup>16</sup> [See Daniel, § 1111.]

<sup>17</sup> [Daniel, § 1059, *et seq.*] See § 142, subsec. 1; also § 183.

<sup>18</sup> "This is, perhaps, new law, and

is important, having regard to the next subsection." Chalmers, p. 137*n*. The subsection referred to reads: "The fact that the holder has reason to believe that the bill, on presentment, will be dishonored, does not excuse presentment." This provision does not appear in the American Act. But if the drawer has no right to expect acceptance, presentment for payment is excused. § 139.

<sup>19</sup> Page 689.

§ 248. Rights of holder where bill not accepted.

When a bill is dishonored by non-acceptance, an immediate right of recourse against the drawers and indorsers accrues to the holder, and no presentment for payment is necessary.<sup>20</sup>

[NOTE. — See Bills of Exchange Act, section 43, subdivision (2).]

ARTICLE XIV.

PROTEST.

SECTION 260. In what cases protest necessary.

261. Protest; how made.

262. Protest; by whom made.

263. Protest; when to be made.

264. Protest; where made.

265. Protest both for non-acceptance and non-payment.

266. Protest before maturity where acceptor insolvent.

267. When protest dispensed with.

268. Protest where bill is lost or destroyed or wrongly detained.

§ 260. In what cases protest necessary.

Where a foreign bill,<sup>21</sup> appearing on its face to be such is dishonored by non-acceptance, it must be duly protested for non-acceptance, and where such a bill which has not previously been dishonored by non-acceptance is dishonored by non-payment, it must be duly protested for non-payment. If it is not so protested, the drawer and indorsers are discharged.<sup>22</sup> Where a bill does not appear on its face to be a foreign bill, protest thereof in case of dishonor is unnecessary.<sup>23</sup>

[NOTE. — See Bills of Exchange Act, section 51, subdivision (2).]

§ 261. Protest; how made.

The protest must be annexed to the bill, or must contain a copy thereof,<sup>24</sup> and must be under the hand and seal<sup>25</sup> of the notary making it, and must specify:

<sup>20</sup> Pages 689–690. “The immediate right of recourse arising on non-acceptance is an exceptional right, and seems peculiar to English law and American law. (*Whitehead v. Walker*, 9 M. & W., at p. 516; *Watson v. Tarpoley*, 20 How. (U. S.), at p. 519; cf. *Dunn v. O’Keefe*, 5 M. & S., at p. 289.) Under the continental codes the holder can only protest the bill for non-acceptance, and demand security from the drawer and indorsers. (French Code, arts. 119, 120; German Exchange Law, arts. 25–28.) The effect of this conflict of laws does not appear to have been judicially considered.” Chalmers, p. 140.

<sup>21</sup> See § 213.

<sup>22</sup> Page 691. “The notice of dishonor is not bad because it omits to state that the bill has been protested. (*Ex parte Lowenthal*, L. R. 9 Ch. 591.)” Chalmers, p. 172.

<sup>23</sup> Page 000.

<sup>24</sup> [See Bills of Exchange Act, section 51, subdivision (7); Daniel, § 944.]

<sup>25</sup> Cases, pp. 482, 590. [In some of the States, as in New York, the use of a seal is not necessary where the cer-

1. The time and place of presentment;
2. The fact that presentment was made and the manner thereof;
3. The cause or reason for protesting the bill;
4. The demand made and the answer given, if any, or the fact that the drawee or acceptor could not be found.<sup>1</sup>

### § 262. Protest; by whom made.

Protest may be made by:

1. A notary public;<sup>2</sup> or
2. By any respectable resident of the place where the bill is dishonored, in the presence of two or more credible witnesses.<sup>3</sup>

[NOTE.—See *Todd v. Neal's Administrator*, 49 Ala. 273; Daniel, §§ 934-934-a; Civil Code of California, 3226.]

### § 263. Protest; when to be made.

When a bill is protested, such protest must be made on the day of its dishonor,<sup>4</sup> unless delay is excused as herein provided.<sup>5</sup> When a bill has been duly noted,<sup>6</sup> the protest may be subsequently extended as of the date of the noting.<sup>7</sup>

See pages 696-698.

### § 264. Protest; where made.

A bill must be protested at the place where it is dishonored,<sup>8</sup> except that when a bill drawn payable at the place of business or residence

tificate is to be used in the State; but a seal is probably desirable where the certificate is to be used in other jurisdictions.]

<sup>1</sup> Pages 691-695. [See Daniel, §§ 950-958. The Bills of Exchange Act provides that protest must specify the person at whose request the bill is protested, but this makes a change in the law. Daniel, § 956.]

<sup>2</sup> Pages 698-700. "In England the notarial presentment of the bill to the drawee or acceptor is almost always made by the notary's clerk. (Brooks' Notary, 4th ed., pp. 78 and 138.) In America the validity of a protest founded on such presentment has been doubted. (See Parsons on Bills, p. 641.)" Chalmers, p. 175.

<sup>3</sup> See Bills of Exchange Act, section 94.

<sup>4</sup> [See Bills of Exchange Act, section 51, subdivision (4); *Dennistoun v. Stewart*, 19 How. 606; Byles on Bills, 257.] "Before the act it was

not clear that a bill could not be lawfully noted for protest on the day after its dishonor; but the business members of the Select Committee were unanimous in thinking that noting on the day of dishonor should be made obligatory." Chalmers, p. 173.

<sup>5</sup> See § 267.

<sup>6</sup> "By 'noting' is meant the minute made by a notary public on a dishonored bill at the time of its dishonor. The formal notarial certificate, or protest, attesting the dishonor of the bill, is based upon the noting. The 'noting,' consists of the notary's initials, the date, the noting charges, and a mark referring to the notary's register written on the bill itself." Chalmers, p. 171.

<sup>7</sup> Pages 694-695. [*Bailey v. Dozier*, 6 How. 23; *Cayuga Co. Bank v. Hunt*, 2 Hill, 635; Daniel, § 940; Byles on Bills, 257.]

<sup>8</sup> [See Daniel, § 935; Byles on Bills, 217.]

of some person other than the drawee, has been dishonored by non-acceptance, it must be protested for non-payment at the place where it is expressed to be payable, and no further presentment for payment to, or demand on, the drawee is necessary.<sup>9</sup>

**§ 265. Protest both for non-acceptance and non-payment.**

A bill which has been protested for non-acceptance may be subsequently protested for non-payment.

[NOTE. — See Bills of Exchange Act, section 51, subdivision (3).] “Protest in such case might be necessary for the purpose of charging a foreign drawer or indorser in his own country. An English act can only lay down the law for the United Kingdom, though by the comity of nations the duties of the holder would generally be regarded as regulated by the law of the place where they are to be performed . . . Under some continental codes no right of action arises on non-acceptance; the holder can demand security from antecedent parties, but he is bound to re-present the bill at maturity.” Chalmers, p. 172.

**§ 266. Protest before maturity where acceptor insolvent.**

Where the acceptor has been adjudged a bankrupt or an insolvent or has made an assignment for the benefit of creditors, before the bill matures, the holder may cause the bill to be protested for better security against the drawer and indorsers.

[NOTE. — See Bills of Exchange Act, section 51, subdivision (5); Daniel, § 530.] “Under some continental codes, when the acceptor fails during the currency of a bill, security can be demanded from the drawer and indorsers. (German Exchange Law, art. 29; Netherlands Code, arts. 177, 178.) English law provides no such remedy, and the only effect of such a protest in England is that the bill may be accepted for honor. In France, if the acceptor fails, the bill may at once be treated as dishonored and protested for non-payment. (French Code, art. 163; Nouguié, § 1277.)” Chalmers, p. 173.

**§ 267. When protest dispensed with.**

Protest is dispensed with by any circumstances which would dispense with notice of dishonor.<sup>10</sup> Delay in noting or protesting is excused when delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct, or negligence.<sup>11</sup> When the cause of delay ceases to operate, the bill must be noted or protested with reasonable diligence.

[NOTE. — See Bills of Exchange Act, section 51, subdivision (9).]

<sup>9</sup> [Bills of Exchange Act, section 51, subdivision (6); 2 and 3 William IV., ch. 98; Daniel, § 935; Byles on Bills, 258.] “Suppose a bill is drawn on B in Liverpool, ‘payable at the X Bank in London.’ It is dishonored by non-acceptance. It is to be protested for non-payment in London without any further demand on B. Ordinarily the protest recites the demand on the acceptor or other payer.” Chalmers, p. 174.

<sup>10</sup> Page 578. See §§ 180–186. Does this incorporate § 188? See Chalmers, p. 176.

<sup>11</sup> Chalmers cites: *Legge v. Thorpe*, 12 East, 171; *Campbell v. Webster*, 15 L. J. C. P. 4; *Rothschild v. Currie*, 1 Q. B., at p. 47.

### § 268. Protest where bill is lost or destroyed or wrongly detained.

Where a bill is lost or destroyed or is wrongly detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof.

[NOTE. — See Bills of Exchange Act, section 51, subdivision (8); Daniel, § 1464.] “Pothier, No. 145; Brooks’ Notary, 4th ed., pp. 137 and 217. See further as to lost bills, sections 69 and 70 (Bills of Exchange Act). The particulars can usually be obtained from the bill book.” Chalmers, p. 175n.

## ARTICLE XV.

### ACCEPTANCE FOR HONOR.

SECTION 280. When bill may be accepted for honor.

281. Acceptance for honor; how made.

282. When deemed to be an acceptance for honor of the drawer.

283. Liability of acceptor for honor.

284. Agreement of acceptor for honor.

285. Maturity of bill payable after sight; accepted for honor.

286. Protest of bill accepted for honor or containing a reference in case of need.

287. Presentment for payment to acceptor for honor; how made.

288. When delay in making presentment is excused.

289. Dishonor of bill by acceptor for honor.

NOTE. — See pp. 701–706.

### § 280. When bill may be accepted for honor.

Where a bill of exchange has been protested for dishonor by non-acceptance or protested for better security and is not overdue, any person not being a party already liable thereon, may, with the consent of the holder, intervene and accept the bill *supra protest* for the honor of any party liable thereon or for the honor of the person for whose account the bill is drawn. The acceptance for honor may be for part only of the sum for which the bill is drawn; and where there has been an acceptance for honor for one party, there may be a further acceptance by a different person for the honor of another party.

[NOTE. — See Bills of Exchange Act, section 65, subdivisions (1) and (2); Byles on Bills, 262–266. The Bills of Exchange Act makes no provision for different acceptances *supra protest*; but this is authorized by the commercial law. Byles on Bills, 263.] “In the United States, as in England, the holder may refuse to allow acceptance for honor (See Story, § 122), for he may wish to exercise his immediate right of recourse which arises on non-acceptance.” Chalmers, p. 226.

### § 281. Acceptance for honor; how made.

An acceptance for honor *supra protest* must be in writing and indicate that it is an acceptance for honor, and must be signed by the acceptor for honor.

[NOTE. — See Bills of Exchange Act, section 65, subdivision (3). The Bills of Exchange Act requires the acceptance for honor to be written on the bill, but see note to section 132 (N. Y., § 220).]

**§ 282. When deemed to be an acceptance for honor of the drawer.**

Where an acceptance for honor does not expressly state for whose honor it is made, it is deemed to be an acceptance for the honor of the drawer.

[NOTE. — See Bills of Exchange Act, section 65, subdivision (4).]

**§ 283. Liability of the acceptor for honor.**

The acceptor for honor is liable to the holder and to all parties to the bill subsequent to the party for whose honor he has accepted.

[NOTE. — See Bills of Exchange Act, section 66, subdivision (2).]

**§ 284. Agreement of acceptor for honor.**

The acceptor for honor by such acceptance engages that he will on due presentment pay the bill according to the terms of his acceptance, provided it shall not have been paid by the drawee, and provided also, that it shall have been duly presented for payment and protested for non-payment and notice of dishonor given to him.

[NOTE. — See Bills of Exchange Act, section 66, subdivision (1).]

**§ 285. Maturity of bill payable after sight; accepted for honor.**

Where a bill payable after sight is accepted for honor, its maturity is calculated from the date of the noting for non-acceptance and not from the date of the acceptance for honor.

[NOTE. — See Bills of Exchange Act, section 65, subdivision (5).] “This section brings the law into accordance with mercantile understanding, and gets rid of an inconvenient ruling to the effect that maturity was to be calculated from the date of acceptance for honor. (*William v. Germaine*, 7 B. & C. 468.)” Chalmers, p. 228.

**§ 286. Protest of bill accepted for honor or containing a reference in case of need.**

Where a dishonored bill has been accepted for honor *supra protest* or contains a reference in case of need, it must be protested for non-payment before it is presented for payment to the acceptor for honor or referee in case of need.

[NOTE. — See Bills of Exchange Act, section 67, subdivision (1).]

**§ 287. Presentment for payment to acceptor for honor; how made.**

Presentment for payment to the acceptor for honor must be made as follows:

1. If it is to be presented in the place where the protest for non-payment was made, it must be presented not later than the day following its maturity;

2. If it is to be presented in some other place than the place where it was protested, then it must be forwarded within the time specified in section one hundred and seventy-five.

[NOTE. — See Bills of Exchange Act, section 67, subsec. (2). “Doubts having arisen as to the day when the bill should be again presented to the



acceptor for honor, or referee in case of need, for payment, the 6 and 7 Will. 4, c. 58, enacts, that it shall not be necessary to present, or in case the acceptor for honor or referee live at a distance, to forward for presentment, till the day following that on which the bill becomes due." Byles on Bills, 263.]

**§ 288. When delay in making presentment is excused.**

The provisions of section one hundred and forty-one apply where there is delay in making presentment to the acceptor for honor or referee in case of need.

**§ 289. Dishonor of bill by acceptor for honor.**

When the bill is dishonored by the acceptor for honor it must be protested for non-payment by him.

[NOTE. — Bills of Exchange Act, section 67, subdivision (4).]

## ARTICLE XVI.

### PAYMENT FOR HONOR.

**SECTION 300. Who may make payment for honor.**

301. Payment for honor; how made.

302. Declaration before payment for honor.

303. Preference of parties offering to pay for honor.

304. Effect on subsequent parties where bill is paid for honor.

305. Where holder refuses to receive payment *supra protest*.

306. Rights of payer for honor.

NOTE. — See pp. 707-708.

**§ 300. Who may make payment for honor.**

Where a bill has been protested for non-payment, any person may intervene and pay it *supra protest* for the honor of any person liable thereon or for the honor of the person for whose account it was drawn.

[NOTE. — See Bills of Exchange Act, section 68, subdivision (1); Byles on Bills, 267-269; Daniel, § 1254.]

**§ 301. Payment for honor; how made.**

The payment for honor *supra protest* in order to operate as such and not as a mere voluntary payment must be attested by a notarial act of honor which may be appended to the protest or form an extension to it.

[NOTE. — See Bills of Exchange Act, section 68, subdivision (3); Byles on Bills, 267; Daniel, § 1258.]

**§ 302. Declaration before payment for honor.**

The notarial act of honor must be founded on a declaration made by the payer for the honor or by his agent in that behalf declaring his intention to pay the bill for honor and for whose honor he pays.

[NOTE. — See Bills of Exchange Act, section 68, subdivision (4).]

### § 303. Preference of parties offering to pay for honor.

Where two or more persons offer to pay a bill for the honor of different parties, the person whose payment will discharge most parties to the bill is to be given the preference.

[NOTE. — See Bills of Exchange Act, section 68, subdivision (2).]

### § 304. Effect on subsequent parties where bill is paid for honor.

Where a bill has been paid for honor all parties subsequent to the party for whose honor it is paid are discharged, but the payer for honor is subrogated for, and succeeds to, both the rights and duties of the holder as regards the party for whose honor he pays and all parties liable to the latter.

[NOTE. — See Bills of Exchange Act, section 68, subdivision (5); Daniel, § 1255.]

### § 305. Where holder refuses to receive payment *supra protest*.

Where the holder of a bill refuses to receive payment *supra protest*, he loses his right of recourse against any party who would have been discharged by such payment.

[NOTE. — See Bills of Exchange Act, section \*8, subdivision (7).]

### § 306. Rights of payer for honor.

The payer for honor on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonor, is entitled to receive both the bill itself and the protest.

[NOTE. — See Bills of Exchange Act, section 68, subdivision (6).]

## ARTICLE XVII.

### BILLS IN SETS.

#### SECTION 310. Bill in sets constitutes one bill.

311. Rights of holders where different parts are negotiated.

312. Liability of holder who indorses two or more parts of a set to different persons.

313. Acceptance of bills drawn in sets.

314. Payment by acceptor of bills drawn in sets.

315. Effect of discharging one of a set.

NOTE. — See pp. 709-713.

### § 310. Bill in sets constitutes one bill.

Where a bill is drawn in a set, each part of the set being numbered and containing a reference to the other parts, the whole of the parts constitutes one bill.

[NOTE. — See Bills of Exchange Act, section 71, subdivision (1); Byles on Bills, 387; Daniel, § 113.] “If one part omit reference to the rest, it becomes a separate bill in the hands of a *bona fide* holder. It has been held that an agreement to deliver up an unaccepted bill drawn in a set is an agreement

to deliver up all the parts in existence (*Kearney v. West Granada Co.*, 26 L. J. Ex. 15); and also that a person who negotiates a bill of exchange drawn in a set, is bound to deliver up all the parts in his possession, but by negotiating one part he does not warrant that he has the rest. (*Pinard v. Klockman*, 32 L. J. Q. B. 82.) In England the obligation to give a set is presumably a matter of bargain." Chalmers, p. 235. •

### § 311. Rights of holders where different parts are negotiated.

Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is as between such holders the true owner of the bill. But nothing in this section affects the rights of a person who in due course accepts or pays the part first presented to him.

[NOTE. — See Bills of Exchange Act, section 71, subdivision (3); Byles on Bills, 389.]

### § 312. Liability of holder who indorses two or more parts of a set to different persons.

Where the holder of a set indorses two or more parts to different persons he is liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed, as if such parts were separate bills.

[NOTE. — See Bills of Exchange Act, section 71, subdivision (2); *Holds-worth v. Hunter*, 10 B. & C. 449; Byles on Bills, 389.]

### § 313. Acceptance of bills drawn in sets.

The acceptance may be written on any part, and it must be written on one part only. If the drawee accepts more than one part, and such accepted parts are negotiated to different holders in due course, he is liable on every such part as if it were a separate bill.

[NOTE. — See Bills of Exchange Act, section 71, subdivision (4); *Holds-worth v. Hunter*, 10 B. & C. 449; Byles on Bills, 389.]

### § 314. Payment by acceptor of bills drawn in sets.

When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereon.

[NOTE. — See Bills of Exchange Act, section 71, subdivision (5); Byles on Bills, 389.]

### § 315. Effect of discharging one of a set.

Except as herein otherwise provided, where any one part of a bill drawn in a set is discharged by payment or otherwise the whole bill is discharged.

[NOTE. — See Bills of Exchange Act, section 71, subdivision (6); Byles on Bills, 388.]

## ARTICLE XVIII.

## PROMISSORY NOTES AND CHECKS.

## SECTION 320. Promissory note defined.

321. Check defined.

322. Within what time a check must be presented.

323. Certification of check; effect of.

324. Effect where holder of check procures it to be certified.

325. When check operates as an assignment.

326. Recovery of forged check.

## § 320. Promissory note defined.

A negotiable promissory note within the meaning of this chapter is an unconditional promise in writing made by one person to another signed by the maker engaging to pay on demand or at a fixed or determinable future time, a sum certain in money to order or to bearer.<sup>12</sup> Where a note is drawn to the maker's own order, it is not complete until indorsed by him.<sup>13</sup>

[NOTE. — See Bills of Exchange Act, section 83.] "A bank note may be defined as a promissory note issued by a banker payable to bearer on demand. But a bank note differs from an ordinary note in various important respects. Among others it may be reissued after payment. See further distinctions pointed out by Bramwell, B. (*Lichfield Union v. Greene*, 26 L. J. Ex., at p. 142.)" Chalmers, p. 263.

## § 321. Check defined.

A check is a bill of exchange drawn on a bank,<sup>14</sup> payable on demand.<sup>15</sup> Except as herein otherwise provided, the provisions of this chapter applicable to a bill of exchange payable on demand apply to a check.<sup>16</sup>

<sup>12</sup> Pages 714-721. See § 20, and cases under that section. See generally on form and interpretation, §§ 20-42.

The English Act includes notes payable "To, or to the order of, a specified person or to bearer," that is, it includes non-negotiable notes. So also was the former New York statute. (*Carnwright v. Gray*, 127 N. Y. 92.) This section changes the New York law and confines the operation of the Act to negotiable notes.

<sup>13</sup> See § 27, subsec. 2, and § 28, subsec. 5. Page 715.

<sup>14</sup> Pages 722-724. [See Bills of Exchange Act, section 73; *Bull v. Kasson*, 123 U. S. 105; *Hopkinson v. Foster*, L. R. 18 Eq. 74.] See § 2, defining "bank."

<sup>15</sup> [Daniel, § 1574.]

<sup>16</sup> "The Act is declaratory in so far as it defines a check as a bill of exchange. (*M'Lean v. Clydesdale Bank*, L. R. 9 App. Cas. 95.) It is no part of the definition that a check should be an inland bill, or that it should be drawn by a customer upon his banker. \* \* \* See checks compared with and distinguished from ordinary bills by Parke, B. (9 Moore P. C., at p. 69), Erle, J., and Byles, J. (8 C. B. N. S., at pp. 380, 381, as modified by L. R. 19 Eq., at p. 76, Jessel, M. R.), Pallett, C. B. (10 Ir. R. C. L., at p. 490), and the Supreme Court of the United States. (10 Wallace, at p. 647.) All checks are bills of exchange, but all bills of exchange are not checks; therefore, an authority to draw checks

### § 322. Within what time a check must be presented.

A check must be presented for payment within a reasonable time after its issue or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay.<sup>17</sup>

[NOTE. — See *Smith v. Jones*, 2 Bush. 103; *Cork v. Bacon*, 45 Wis. 192; *Bull v. Kasson*, 123 U. S. 105; *Daniel*, §§ 1586-1600.] See Bills of Exchange Act, section 74. For effect of delay upon indorser's liability, see pages 734-743.

### § 323. Certification of check; effect of.

Where a check is certified by the bank on which it is drawn the certification is equivalent to an acceptance.<sup>18</sup>

### § 324. Effect where the holder of check procures it to be certified.

Where the holder of a check procures it to be accepted or certified the drawer<sup>19</sup> and all indorsers<sup>20</sup> are discharged from liability thereon.

### § 325. When check operates as an assignment.

A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check.<sup>21</sup>

[NOTE. — See *Bank v. Millard*, 10 Wall. 152; *Bank v. Schuler*, 120 U. S. 511; *Bank v. Whitman*, 94 U. S. 343, 344; *St. L. & S. F. R'y Co. v. Johnson*, 133 U. S. 566; *Attorney-General v. Continental Life Insurance Co.*, 71 N. Y. 325, 330; *First Nat. Bank of Union Mills v. Clark*, 134 N. Y. 368; *O'Connor v. Mechanics' Bank*, 124 N. Y. 324; *Covert v. Rhodes*, 48 Ohio St. 66; *Pickle v. Peoples' Nat Bank*, 88 Tenn. 380; *Boetcher v. Colorado Nat. Bank*, 15 Colo. 16; *Hopkinson v. Foster*, L. R. 18 Eq. 74; *Contra: Fonner v. Smith*, 31 Neb. 107; *Munn v. Burch*, 25 Ill. 35; *Bank v. Patton*, 109 Ill. 470, 485.] See § 211.

### § 326. Recovery of forged check.

No bank shall be liable to a depositor for the payment by it of a forged or raised check, unless within one year after the return to

does not necessarily include an authority to draw bills. *Forster v. Mackreth*, L. R. 2 Ex. 163.). Apart from statute, the distinctions between checks and ordinary bills of exchange arise from the relationship of banker and customer subsisting between the drawer and drawee of a check. A check is intended for prompt presentment, while a note payable on demand is deemed to be a continuing security. (*Brooks v. Mitchell*, 9 M. & W., at p. 18; *Chartered Bank v. Dickson*, L. R. 3 C. P., at p. 579.) "Chalmers, pp. 245-246.

<sup>17</sup> Pages 725-733. See "reasonable time," defined in § 4. Independent of statute a check must be presented or forwarded for presentment on the day

after it is received. Chalmers, p. 248. The draft of the American Act originally contained the following: "The death of the drawer does not operate as a revocation of the authority of the bank to pay a check, if the check is presented for payment within ten days from the date thereof;" but this was struck out of the final draft. [This was taken from the statutes of Massachusetts (Pub. St. Supp. 1888, ch. 210.) There seems to be some doubt as to the common-law rule. See *Daniel*, § 1618b.]

<sup>18</sup> Pages 743-751.

<sup>19</sup> Pages 743-748.

<sup>20</sup> Pages 748-751.

<sup>21</sup> Pages 752-758.

the depositor of the voucher of such payment, such depositor shall notify the bank that the check so paid was forged or raised.

Added by Laws of 1904, ch. 287. See note 6, *ante*, p. 758. See also pages 758-771.

## ARTICLE XIX.<sup>22</sup>

### NOTES GIVEN FOR PATENT RIGHTS AND FOR A SPECULATIVE CONSIDERATION.

SECTION 330. Negotiable instruments given for patent rights.

331. Negotiable instruments given for a speculative consideration.

332. How negotiable bonds are made non-negotiable.

#### § 330. Negotiable instruments given for patent rights.

A promissory note or other negotiable instrument, the consideration of which consists wholly or partly of the right to make, use or sell any invention claimed or represented by the vendor at the time of sale to be patented, must contain the words "given for a patent right" prominently and legibly written or printed on the face of such note or instrument above the signature thereto; and such note or instrument in the hands of any purchaser or holder is subject to the same defenses as in the hands of the original holder; but this section does not apply to a negotiable instrument given solely for the purchase price or the use of a patented article.

It is a misdemeanor, to take, sell, or transfer such an instrument, knowing the consideration to be as above described, unless the words "given for a patent right" appear on the instrument above the signature. N. Y. Penal Law, § 1520 (originally Laws of N. Y. 1897, c. 613). See note 1, *ante*, pp. 384-385.

#### § 331. Negotiable instruments given for a speculative consideration.

If the consideration of a promissory note or other negotiable instrument consists in whole or in part of the purchase price of any farm product, at a price greater by at least four times than the fair market value of the same product at the time, in the locality, or of the membership and rights in an association, company or combination to produce or sell any farm product at a fictitious rate, or of a contract or bond to purchase or sell any farm product at a price greater by four times than the market value of the same product at the time in the locality, the words, "given for a speculative consideration," or other words clearly showing the nature of the consideration, must be prominently and legibly written or printed on the face of such note or instrument, above the signature thereof; and such note or instrument, in the hands of any purchaser or holder, is subject to the same defenses as in the hands of the original owner or holder.

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<sup>22</sup> Not a part of the Negotiable Instruments Law in most states. See note 1, *ante*, pp. 384-385.

It is a misdemeanor to take, sell or transfer such an instrument, knowing the consideration to be as above described, unless the words "given for a speculative consideration," or other words clearly showing the nature of the consideration, appear on the instrument above the signature. N. Y. Penal Law, § 1521 (originally Laws of N. Y. 1897, ch. 613.) See also *Arnd v. Sjoblom*, 131 Wis. 642, *ante*, p. 383, and note 1, *ante*, pp. 384-385.

### § 332. How negotiable bonds are made non-negotiable.

The owner or holder of any corporate or municipal bond or obligation (except such as are designated to circulate as money, payable to bearer), heretofore or hereafter issued in and payable in this state, but not registered in pursuance of any state law, may make such bond or obligation, or the interest coupon accompanying the same, non-negotiable, by subscribing his name to a statement indorsed thereon, that such bond, obligation or coupon is his property; and thereon the principal sum therein mentioned is payable only to such owner or holder, or his legal representatives or assigns, unless such bond, obligation or coupon be transferred by indorsement in blank, or payable to bearer, or to order, with the addition of the assignor's place of residence.

## ARTICLE XX.<sup>23</sup>

### LAWS REPEALED; WHEN TO TAKE EFFECT.

SECTION 340. Laws repealed.

341. When to take effect.

### § 340. Laws repealed.

Of the laws enumerated in the schedule hereto annexed, that portion specified in the last column is hereby repealed.

### § 341. When to take effect.

This chapter shall take effect immediately.<sup>24</sup>

#### *Schedule of Laws Repealed.*

Revised Statutes.		Sections.	Subject matter.
R. S., pt. II, ch. 4, tit. II.....		All.....	Bills and notes.
Laws of	Chapter.	Sections.	Subject matter.
1788....	33....	All....	Promissory notes to be negotiable.
1794....	48....	All....	Promissory notes to be negotiable same as bills of exchange.

<sup>23</sup> This particular schedule of repeals applies, of course, only to New York state.

<sup>24</sup> The Negotiable Instruments Law

was originally enacted in New York by Laws of 1897, ch. 612, which took effect October 1, 1897.

Laws of	Chapter.	Sections.	Subject matter.
1801....	44....	All....	Promissory notes to be negotiable same as bills of exchange.
1819....	34....	All....	Regulating recovery of damages upon certain bills of exchange.
1823....	216....	All....	Notice of protest in New York city regulated in certain cases.
1826....	17....	All....	Notice of protest in New York city further regulated.
1828....	20....	15, para. 30 (2nd meet.).	Adding § 22 to R. S., pt. 2, ch. 4, title 2.
1828....	21....	1, paras. 51, 272, 393, 460.	Repealing Laws 1801, 1819, 1823, 1826, above.
1835....	141....	All....	Notice of protest; how given.
1857....	416....	All....	Commercial paper.
1865....	309....	All....	Protest of foreign bills, etc.
1870....	438....	All....	Negotiability of corporate bonds; how limited.
1871....	84....	All....	Negotiable bonds; how made non-negotiable.
1873....	595....	All....	Negotiable bonds; how made negotiable.
1877....	65....	All....	Negotiable instruments given for patent rights.
1887....	461....	All....	Effect of holidays upon payment of commercial paper.
1888....	229....	All....	One hundredth anniversary of the inauguration of George Washington.
1891....	262....	All....	Negotiable instruments given for a speculative purpose.
1894....	607....	All....	Days of grace abolished.
1897....	612....	All....	The Negotiable Instruments Law as originally enacted in New York. <sup>25</sup>
1897....	613....	2, 3....	
1898....	336....	All....	Correcting manifest errors in Negotiable Instruments Law as originally enacted. <sup>25</sup>
1904....	287....	All....	Adding § 326. See note 6, <i>ante</i> , p. 758.

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<sup>25</sup> See note 1, *ante*, p. 779.





ENGLISH

BILLS OF EXCHANGE ACT, 1882.

45 AND 46 VICT. CH. 61.

*As Amended by 6 Edw. 7, Ch. 17, 1906.*



# BILLS OF EXCHANGE ACT, 1882.

45 AND 46 VICT., CH. 61.

An act to codify the law relating to bills of exchange, cheques, and promissory notes.

[18th August, 1882.]

Be it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

## PART I.

### PRELIMINARY.

#### 1. Short title.

This act may be cited as the Bills of Exchange Act, 1882.

#### 2. Interpretation of terms.

In this act, unless the context otherwise requires —

“Acceptance” means an acceptance completed by delivery or notification.

“Action” includes counter-claim and set-off.

“Banker” includes a body of persons, whether incorporated or not, who carry on the business of banking.

“Bankrupt” includes any person whose estate is vested in a trustee or assignee, under the law for the time being in force relating to bankruptcy.

“Bearer” means the person in possession of a bill or note which is payable to bearer.

“Bill” means bill of exchange, and “note” means promissory note.

“Delivery” means transfer of possession, actual or constructive, from one person to another.

“Holder” means the payee or endorsee of a bill or note who is in possession of it, or the bearer thereof.

“Indorsement” means an indorsement completed by delivery.

“Issue” means the first delivery of a bill or note, completed in form, to a person who takes it as a holder.

“Person” includes a body of persons, whether incorporated or not.

“Value” means valuable consideration.

“Written” includes printed, and “writing” includes print.

## PART II.

## BILLS OF EXCHANGE.

*Form and Interpretation.***3. Bill of exchange defined.**

(1) A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time, a sum certain in money to or to the order of a specified person, or to bearer.

(2) An instrument which does not comply with these conditions, or which orders any act to be done in addition to the payment of money, is not a bill of exchange.

(3) An order to pay out of a particular fund is not unconditional within the meaning of this section ; but an unqualified order to pay, coupled with (a) an indication of a particular fund out of which the drawee is to re-imburse himself or a particular account to be debited with the amount, or (b) a statement of the transaction which gives rise to the bill, is unconditional.

(4) A bill is not invalid by reason —

(a) That it is not dated;

(b) That it does not specify the value given, or that any value has been given therefor;

(c) That it does not specify the place where it is drawn or the place where it is payable.

**4. Inland and foreign bills.**

(1) An inland bill is a bill which is, or on the face of it purports to be—(a) both drawn and payable within the British Islands, or (b) drawn within the British Islands upon some person resident therein. Any other bill is a foreign bill.

For the purposes of this act “British Islands” mean any part of the United Kingdom of Great Britain and Ireland, the Islands of Man, Guernsey, Jersey, Alderney, and Sark, and the islands adjacent to any of them being part of the dominions of Her Majesty.

(2) Unless the contrary appear on the face of the bill the holder may treat it as an inland bill.

**5. Effect where different parties to bill are the same person.**

(1) A bill may be drawn payable to, or to the order of, the drawer; or it may be drawn payable to, or to the order of, the drawee.

(2) Where in a bill drawer and drawee are the same person, or where the drawee is a fictitious person or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or as a promissory note.

**6. Address to drawee.**

(1) The drawee must be named or otherwise indicated in a bill with reasonable certainty.

(2) A bill may be addressed to two or more drawees whether they are partners or not, but an order addressed to two drawees in the alternative, or two or more drawees in succession, is not a bill of exchange.

**7. Certainty required as to payee.**

(1) Where a bill is not payable to bearer, the payee must be named or otherwise indicated therein with reasonable certainty.

(2) A bill may be made payable to two or more payees jointly, or it may be made payable in the alternative to one of two, or one or some of several payees. A bill may also be made payable to the holder of an office for the time being.

(3) Where the payee is a fictitious or non-existing person, the bill may be treated as payable to bearer.

**8. What bills are negotiable.**

(1) When a bill contains words prohibiting transfer, or indicating an intention that it should not be transferable, it is valid as between the parties thereto, but is not negotiable.

(2) A negotiable bill may be payable either to order or to bearer.

(3) A bill is payable to bearer which is expressed to be so payable, or on which the only or last indorsement is an indorsement in blank.

(4) A bill is payable to order which is expressed to be so payable, or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it should not be transferable.

(5) Where a bill, either originally or by indorsement, is expressed to be payable to the order of a specified person, and not to him or his order, it is nevertheless payable to him or his order at his option.

**9. Sum payable.**

(1) The sum payable by a bill is a sum certain within the meaning of this act, although it is required to be paid —

(a) With interest.

(b) By stated installments.

(c) By stated installments, with a provision that upon default in payment of any installment the whole shall become due.

(d) According to an indicated rate of exchange, or according to a rate of exchange to be ascertained as directed by the bill.

(2) Where the sum payable is expressed in words and also in figures, and there is a discrepancy between the two, the sum denoted by the words is the amount payable.

(3) Where a bill is expressed to be payable with interest, unless the instrument otherwise provides, interest runs from the date of the bill, and if the bill is undated from the issue thereof.

**10. Bill payable on demand.**

(1) A bill is payable on demand —

(a) Which is expressed to be payable on demand, or at sight, or on presentation ; or

(b) In which no time for payment is expressed.

(2) Where a bill is accepted or indorsed when it is overdue, it shall, as regards the acceptor who so accepts, or any indorser who so indorses it, be deemed a bill payable on demand.

**11. Bill payable at a future time.**

A bill is payable at a determinable future time within the meaning of this act which is expressed to be payable —

(1) At a fixed period after date or sight.

(2) On or at a fixed period after the occurrence of a specified event which is certain to happen, though the time of happening may be uncertain.

An instrument expressed to be payable on a contingency is not a bill, and the happening of the event does not cure the defect.

## 12. Omission of date in bill payable after date.

Where a bill expressed to be payable at a fixed period after date is issued undated, or where the acceptance of a bill payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the bill shall be payable accordingly.

Provided that (1) where the holder in good faith and by mistake inserts a wrong date, and (2) in every case where a wrong date is inserted, if the bill subsequently comes into the hands of a holder in due course, the bill shall not be avoided thereby, but shall operate and be payable as if the date so inserted had been the true date.

## 13. Ante-dating and post-dating.

(1) Where a bill or an acceptance or any indorsement on a bill is dated, the date shall, unless the contrary be proved, be deemed to be the true date of the drawing, acceptance or indorsement, as the case may be.

(2) A bill is not invalid by reason only that it is ante-dated or post-dated, or that it bears date on a Sunday.

## 14. Computation of time of payment.

Where a bill is not payable on demand, the day on which it falls due is determined as follows :

(1) Three days, called days of grace, are, in every case where the bill itself does not otherwise provide, added to the time of payment as fixed by the bill, and the bill is due and payable on the last day of grace :

Provided that —

(a) When the last day of grace falls on Sunday, Christmas Day, Good Friday, or a day appointed by Royal proclamation as a public fast or thanksgiving day, the bill is, except in the case herein-after provided for, due and payable on the preceding business day;

(b) When the last day of grace is a bank holiday (other than Christmas day or Good Friday) under the Bank Holidays Act, 1871,\* and acts amending or extending it, or when the last day of grace is a Sunday and the second day of grace is a bank holiday, the bill is due and payable on the succeeding business day.

(2) Where a bill is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run and by including the day of payment.

(3) Where a bill is payable at a fixed period after sight, the time begins to run from the date of the acceptance if the bill be accepted, and from the date of noting or protest if the bill be noted or protested for non-acceptance or for non-delivery.

(4) The term "month" in a bill means calendar month.

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\* 34 and 35 Vict. ch. 17.

**15. Case of need.**

The drawer of a bill and any indorser may insert therein the name of a person to whom the holder may resort in case of need, that is to say, in case the bill is dishonored by non-acceptance or non-payment. Such person is called the referee in case of need. It is in the option of the holder to resort to the referee in case of need or not as he may think fit.

**16. Optional stipulations by drawer or indorser.**

The drawer of a bill, and any indorser, may insert therein an express stipulation —

- (1) Negating or limiting his own liability to the holder ;
- (2) Waiving as regards himself some or all of the holder's duties.

**17. Definition and requisites of acceptance.**

(1) The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer.

(2) An acceptance is invalid unless it complies with the following conditions, namely —

- (a) It must be written on the bill and be signed by the drawee. The mere signature of the drawee without additional words is sufficient.
- (b) It must not express that the drawee will perform his promise by any other means than the payment of money.

**18. Time for acceptance.**

A bill may be accepted —

(1) Before it has been signed by the drawer, or while otherwise incomplete ;  
 (2) When it is overdue, or after it has been dishonored by a previous refusal to accept, or by non-payment :

(3) When a bill payable after sight is dishonored by non-acceptance, and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill accepted as of the date of first presentment to the drawee for acceptance.

**19. General and qualified acceptances.**

(1) An acceptance is either (a) general or (b) qualified.

(2) A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn.

In particular an acceptance is qualified which is —

- (a) Conditional, that is to say, which makes payment by the acceptor dependent on the fulfillment of a condition therein stated ;
- (b) Partial, that is to say, an acceptance to pay part only of the amount for which the bill is drawn ;
- (c) Local, that is to say, an acceptance to pay only at a particular specified place :

An acceptance to pay at a particular place is a general acceptance, unless it expressly states that the bill is to be paid there only and not elsewhere :

(d) Qualified as to time :

(e) The acceptance of some one or more of the drawees, but not of all



## 20. Inchoate instruments.

(1) Where a simple signature on a blank stamped paper is delivered by the signer in order that it may be converted into a bill, it operates as a *prima facie* authority to fill it up as a complete bill for any amount the stamp will cover, using the signature for that of the drawer, or the acceptor, or an indorser; and, in like manner, when a bill is wanting in any material particular, the person in possession of it has a *prima facie* authority to fill up the omission in any way he thinks fit.

(2) In order that any such instrument when completed may be enforceable against any person who became a party thereto prior to its completion, it must be filled up within a reasonable time, and strictly in accordance with the authority given.

Reasonable time for this purpose is a question of fact.

Provided that if any such instrument after completion is negotiated to a holder in due course, it shall be valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up within a reasonable time and strictly in accordance with the authority given.

## 21. Delivery.

(1) Every contract on a bill, whether it be the drawer's, the acceptor's, or an indorser's, is incomplete and revocable, until delivery of the instrument in order to give effect thereto.

Provided that where an acceptance is written on a bill, and the drawee gives notice to or according to the directions of the person entitled to the bill that he has accepted it, the acceptance then becomes complete and irrevocable.

(2) As between immediate parties, and as regards a remote party other than a holder in due course, the delivery —

(a) In order to be effectual must be made either by or under the authority of the party drawing, accepting, or indorsing, as the case may be:

(b) May be shown to have been conditional or for a special purpose only, and not for the purpose of transferring the property in the bill.

But if the bill be in the hands of a holder in due course a valid delivery of the bill by all parties prior to him so as to make them liable to him is conclusively presumed.

(3) Where a bill is no longer in the possession of a party who has signed it as drawer, acceptor, or indorser, a valid and unconditional delivery by him is presumed until the contrary is proved.

### *Capacity and Authority of Parties.*

## 22. Capacity of parties.

(1) Capacity to incur liability as a party to a bill is co-extensive with capacity to contract.

Provided that nothing in this section shall enable a corporation to make itself liable as drawer, acceptor, or indorser of a bill unless it is competent to it so to do under the law for the time being in force relating to corporations.

(2) Where a bill is drawn or indorsed by an infant, minor, or corporation having no capacity or power to incur liability on a bill, the drawing or indorse-

ment entitles the holder to receive payment of the bill, and to enforce it against any other party thereto.

### 23. Signature essential to liability.

No person is liable as drawer, indorser, or acceptor of a bill who has not signed it as such :

Provided that—

(1) Where a person signs a bill in a trade or assumed name, he is liable thereon as if he had signed it in his own name:

(2) The signature of the name of a firm is equivalent to the signature by the person so signing of the names of all persons liable as partners in that firm.

### 24. Forged or unauthorized signature.

Subject to the provisions of this Act, where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorized signature is wholly inoperative, and no right to retain the bill, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority.

Provided that nothing in this section shall effect the ratification of an unauthorized signature not amounting to a forgery.

### 25. Procuration signatures.

A signature by procuration operates as notice that the agent has but a limited authority to sign, and the principal is only bound by such signature if the agent in so signing was acting within the actual limits of his authority.

### 26. Person signing as agent or in representative capacity.

(1) Where a person signs a bill as drawer, indorser, or acceptor, and adds words to his signature indicating that he signs for or on behalf of a principal, or in a representative character, he is not personally liable thereon; but the mere addition to his signature of words describing him as an agent, or as filling a representative character, does not exempt him from personal liability.

(2) In determining whether a signature on a bill is that of the principal or that of the agent by whose hand it is written, the construction most favorable to the validity of the instrument shall be adopted.

### *The Consideration for a Bill.*

### 27. Value and holder for value.

(1) Valuable consideration for a bill may be constituted by, —

(a) Any consideration sufficient to support a simple contract;

(b) An antecedent debt or liability. Such a debt or liability is deemed valuable consideration whether the bill is payable on demand or at a future time.

(2) Where value has at any time been given for a bill the holder is deemed to be a holder for value as regards the acceptor and all parties to the bill who became parties prior to such time.

(3) Where the holder of a bill has a lien on it arising either from contract or by implication of law, he is deemed to be a holder for value to the extent of the sum for which he has a lien.

**28. Accommodation bill or party.**

(1) An accommodation party to a bill is a person who has signed a bill as drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person.

(2) An accommodation party is liable on the bill to a holder for value; and it is immaterial whether, when such holder took the bill, he knew such party to be an accommodation party or not.

**29. Holder in due course.**

(1) A holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following conditions; namely,

(a) That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact:

(b) That he took the bill in good faith and for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it.

(2) In particular the title of a person who negotiates a bill is defective within the meaning of this Act when he obtained the bill, or the acceptance thereof, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.

(3) A holder (whether for value or not), who derives his title to a bill through a holder in due course, and who is not himself a party to any fraud or illegality affecting it, has all the rights of that holder in due course as regards the acceptor and all parties to the bill prior to that holder.

**30. Presumption of value and good faith.**

(1) Every party whose signature appears on a bill is *prima facie* deemed to have become a party thereto for value.

(2) Every holder of a bill is *prima facie* deemed to be a holder in due course; but if in an action on a bill it is admitted or proved that the acceptance, issue, or subsequent negotiation of the bill, is affected with fraud, duress, or force and fear, or illegality, the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill.

*Negotiation of Bills.***31. Negotiation of bill.**

(1) A bill is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the bill.

(2) A bill payable to bearer is negotiated by delivery.

(3) A bill payable to order is negotiated by the indorsement of the holder completed by delivery.

(4) Where the holder of a bill payable to his order transfers it for value without indorsing it, the transfer gives the transferee such title as the transferor had in the bill, and the transferee in addition acquires the right to have the indorsement of the transferor.

(5) Where any person is under obligation to indorse a bill in a representative capacity, he may indorse the bill in such terms as to negative personal liability.

**32. Requisites of a valid indorsement.**

An indorsement in order to operate as a negotiation must comply with the following conditions, namely, —

(1) It must be written on the bill itself and be signed by the indorser. The simple signature of the indorser on the bill, without additional words, is sufficient.

An indorsement written on an allonge, or on a "copy" of a bill issued or negotiated in a country where "copies" are recognized, is deemed to be written on the bill itself.

(2) It must be an indorsement of the entire bill. A partial indorsement, that is to say, an indorsement which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the bill to two or more indorsees severally, does not operate as a negotiation of the bill.

(3) Where a bill is payable to the order of two or more payees or indorsees who are not partners all must indorse, unless the one indorsing has authority to indorse for the others.

(4) Where, in a bill payable to order, the payee or indorsee is wrongly designated, or his name is misspelt, he may indorse the bill as therein described adding, if he thinks fit, his proper signature.

(5) Where there are two or more indorsements on a bill, each indorsement is deemed to have been made in the order in which it appears on the bill, until the contrary is proved.

(6) An indorsement may be made in blank or special. It may also contain terms making it restrictive.

**33. Conditional indorsement.**

Where a bill purports to be indorsed conditionally, the condition may be disregarded by the payer, and payment to the indorsee is valid whether the condition has been fulfilled or not.

**34. Indorsement in blank and special indorsement.**

(1) An indorsement in blank specifies no indorsee, and a bill so indorsed becomes payable to bearer.

(2) A special indorsement specifies the person to whom, or to whose order, the bill is to be payable.

(3) The provisions of this Act relating to a payee apply with the necessary modifications to an indorsee under a special indorsement.

(4) When a bill has been indorsed in blank, any holder may convert the blank indorsement into a special indorsement by writing above the indorser's signature a direction to pay the bill to or to the order of himself or some other person.

**35. Restrictive indorsement.**

(1) An indorsement is restrictive which prohibits the further negotiation of the bill, or which expresses that it is a mere authority to deal with the bill as thereby directed, and not a transfer of the ownership thereof, as, for example, if a bill be indorsed "Pay D. only," or "Pay D. for the account of X.," or "Pay D. or order for collection."

(2) A restrictive indorsement gives the indorsee the right to receive payment of the bill and to sue any party thereto that his indorser could have

sued, but gives him no power to transfer his rights as indorsee unless it expressly authorize him to do so.

(3) Where a restrictive indorsement authorizes further transfer, all subsequent indorsees take the bill with the same rights and subject to the same liabilities as the first indorsee under the restrictive indorsement.

### 36. Negotiation of overdue or dishonoured bill.

(1) Where a bill is negotiable in its origin it continues to be negotiable until it has been (a) restrictively indorsed or (b) discharged by payment or otherwise.

(2) Where an overdue bill is negotiated, it can only be negotiated subject to any defect of title affecting it at its maturity, and thenceforward no person who takes it can acquire or give a better title than that which the person from whom he took it had.

(3) A bill payable on demand is deemed to be overdue within the meaning and for the purposes of this section, when it appears on the face of it to have been in circulation for an unreasonable length of time. What is an unreasonable length of time for this purpose is a question of fact.

(4) Except where an indorsement bears date after the maturity of the bill, every negotiation is *prima facie* deemed to have been effected before the bill was overdue.

(5) Where a bill which is not overdue has been dishonoured any person who takes it with notice of the dishonour takes it subject to any defect of title attaching thereto at the time of dishonour, but nothing in this sub-section shall affect the rights of a holder in due course.

### 37. Negotiation of bill to party already liable thereon.

Where a bill is negotiated back to the drawer, or to a prior indorser, or to the acceptor, such party may, subject to the provisions of this Act, re-issue and further negotiate the bill, but he is not entitled to enforce payment of the bill against any intervening party to whom he was previously liable.

### 38. Rights of the holder.

The rights and powers of the holder of a bill are as follows:

(1) He may sue on the bill in his own name :

(2) Where he is a holder in due course, he holds the bill free from any defect of title of prior parties, as well as from mere personal defences available to prior parties among themselves, and may enforce payment against all parties liable on the bill:

(3) Where his title is defective (a) if he negotiates the bill to a holder in due course, that holder obtains a good and complete title to the bill, and (b) if he obtains payment of the bill the person who pays him in due course gets a valid discharge for the bill.

#### *General Duties of the Holder.*

### 39. When presentment for acceptance is necessary.

(1) Where a bill is payable after sight, presentment for acceptance is necessary in order to fix the maturity of the instrument.

(2) Where a bill expressly stipulates that it shall be presented for acceptance, or where a bill is drawn payable elsewhere than at the residence or place of business of the drawee, it must be presented for acceptance before it can be presented for payment.

(3) In no other case is presentment for acceptance necessary in order to render liable any party to the bill.

(4) Where the holder of a bill, drawn payable elsewhere than at the place of business or residence of the drawee, has not time, with the exercise of reasonable diligence, to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused, and does not discharge the drawer and indorsers.

#### **40. Time for presenting bill payable after sight.**

(1) Subject to the provisions of this Act, when a bill payable after sight is negotiated, the holder must either present it for acceptance or negotiate it within a reasonable time.

(2) If he do not do so, the drawer and all indorsers prior to that holder are discharged.

(3) In determining what is a reasonable time within the meaning of this section, regard shall be had to the nature of the bill, the usage of trade with respect to similar bills, and the facts of the particular case.

#### **41. Rules as to presentment for acceptance, and excuses for non-presentment.**

(1) A bill is duly presented for acceptance which is presented in accordance with the following rules:

(a) The presentment must be made by or on behalf of the holder to the drawee, or to some person authorized to accept or refuse acceptance on his behalf, at a reasonable hour on a business day and before the bill is overdue :

(b) Where a bill is addressed to two or more drawees, who are not partners, presentment must be made to them all, unless one has authority to accept for all, then presentment may be made to him only :

(c) Where the drawee is dead, presentment may be made to his personal representative :

(d) Where the drawee is bankrupt, presentment may be made to him or his trustee :

(e) Where authorized by agreement or usage, a presentment through the post office is sufficient.

(2) Presentment in accordance with these rules is excused, and a bill may be treated as dishonoured by non-acceptance—

(a) Where the drawee is dead or bankrupt, or is a fictitious person or a person not having capacity to contract by bill :

(b) Where, after the exercise of reasonable diligence, such presentment cannot be effected :

(c) Where, although the presentment has been irregular, acceptance has been refused on some other ground.

(3) The fact that the holder has reason to believe that the bill, on presentment, will be dishonoured does not excuse presentment.

#### **42. Non-acceptance.**

(1) When a bill is duly presented for acceptance and is not accepted within

the customary time, the person presenting it must treat it as dishonoured by non-acceptance. If he do not, the holder shall lose his right of recourse against the drawer and indorsers.

#### **43. Dishonour by non-acceptance and its consequences.**

(1) A bill is dishonoured by non-acceptance—

(a) When it is duly presented for acceptance, and such an acceptance as is prescribed by this act is refused or cannot be obtained ; or

(b) When presentment for acceptance is excused and the bill is not accepted.

(2) Subject to the provisions of this Act, when a bill is dishonoured by non acceptance, an immediate right of recourse against the drawer and indorsers accrues to the holder, and no presentment for payment is necessary.

#### **44. Duties as to qualified acceptances.**

(1) The holder of a bill may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance may treat the bill as dishonoured by non-acceptance.

(2) Where a qualified acceptance is taken, and the drawer or an indorser has not expressly or impliedly authorized the holder to take a qualified acceptance, or does not subsequently assent thereto, such drawer or indorser is discharged from his liability on the bill.

The provisions of this sub-section do not apply to a partial acceptance, whereof due notice has been given. Where a foreign bill has been accepted as to part, it must be protested as to the balance.

(3) When the drawer or indorser of a bill receives notice of a qualified acceptance, and does not within a reasonable time express his dissent to the holder, he shall be deemed to have assented thereto.

#### **45. Rules as to presentment for payment.**

Subject to the provisions of this Act, a bill must be duly presented for payment. If it be not so presented the drawer and endorsers shall be discharged.

A bill is duly presented for payment which is presented in accordance with the following rules:—

(1) Where the bill is not payable on demand, presentment must be made on the day it falls due.

(2) Where the bill is payable on demand, then, subject to the provisions of this Act, presentment must be made within a reasonable time after its issue in order to render the drawer liable, and within a reasonable time after its indorsement, in order to render the indorser liable.

In determining what is a reasonable time, regard shall be had to the nature of the bill, the usage of trade with regard to similar bills, and the facts of the particular case.

(3) Presentment must be made by the holder or by some person authorized to receive payment on his behalf at a reasonable hour on a business day, at the proper place as hereinafter defined, either to the person designated by the bill as payer, or to some person authorized to pay or refuse payment on his behalf if with the exercise of reasonable diligence such person can there be found.

**(4) A bill is presented at the proper place : —**

- (a) Where a place of payment is specified in the bill and the bill is there presented.
- (b) Where no place of payment is specified, but the address of the drawee or acceptor is given in the bill, and the bill is there presented.
- (c) Where no place of payment is specified and no address given, and the bill is presented at the drawee's or acceptor's place of business if known, and if not, at his ordinary residence if known.
- (d) In any other case if presented to the drawee or acceptor wherever he can be found, or if presented at his last known place of business or residence.

(5) Where a bill is presented at the proper place, and after the exercise of reasonable diligence no person authorized to pay or refuse payment can be found there, no further presentment to the drawee or acceptor is required.

(6) Where a bill is drawn upon, or accepted by, two or more persons who are not partners, and no place of payment is specified, presentment must be made to them all.

(7) Where the drawee or acceptor of a bill is dead, and no place of payment is specified, presentment must be made to a personal representative, if such there be, and with the exercise of reasonable diligence he can be found.

(8) Where authorized by agreement or usage a presentment through the post-office is sufficient.

**46. Excuses for delay or non-presentment for payment.**

(1) Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate presentment must be made with reasonable diligence.

**(2) Presentment for payment is dispensed with, —**

- (a) Where, after the exercise of reasonable diligence, presentments as required by this Act, cannot be effected.

The fact that the holder has reason to believe that the bill will, on presentment, be dishonoured, does not dispense with the necessity for presentment.

- (b) Where the drawee is a fictitious person.
- (c) As regards the drawer where the drawee or acceptor is not bound, as between himself and the drawer, to accept or pay the bill, and the drawer has no reason to believe that the bill would be paid if presented.
- (d) As regards an indorser, where the bill was accepted or made for the accommodation of that indorser, and he has no reason to expect that the bill would be paid if presented.
- (e) By waiver of presentment, express or implied.

**47. Dishonour by non-payment.**

(1) A bill is dishonoured by non-payment (a) when it is duly presented for payment and payment is refused or cannot be obtained, or (b) when presentment is excused and the bill is overdue and unpaid.

(2) Subject to the provisions of this Act, when a bill is dishonoured by non-



payment, an immediate right of recourse against the drawer and indorsers accrues to the holder.

#### 48. Notice of dishonour and effect of non-notice.

Subject to the provisions of this Act, when a bill has been dishonoured by non-acceptance or by non-payment notice of dishonour must be given to the drawer and each indorser, and any drawer or indorser to whom such notice is not given is discharged ;

Provided that —

(1) Where a bill is dishonoured by non-acceptance, and notice of dishonour is not given, the rights of a holder in due course subsequent to the omission, shall not be prejudiced by the omission.

(2) Where a bill is dishonoured by non-acceptance, and due notice of dishonour is given, it shall not be necessary to give notice of a subsequent dishonour by non-payment unless the bill shall in the meantime have been accepted.

#### 49. Rules as to notice of dishonour.

Notice of dishonour in order to be valid and effectual must be given in accordance with the following rules : —

(1) The notice must be given by or on behalf of the holder, or by or on behalf of an indorser who, at the time of giving it, is himself liable on the bill.

(2) Notice of dishonour may be given by an agent either in his own name, or in the name of any party entitled to give notice whether that party be his principal or not.

(3) Where the notice is given by or on behalf of the holder, it enures for the benefit of all subsequent holders and all prior indorsers who have a right of recourse against the party to whom it is given.

(4) Where notice is given by or on behalf of an indorser entitled to give notice as hereinbefore provided, it enures for the benefit of the holder and all indorsers subsequent to the party to whom notice is given.

(5) The notice may be given in writing or by personal communication, and may be given in any terms which sufficiently identify the bill, and intimate that the bill has been dishonoured by non-acceptance or non-payment.

(6) The return of a dishonoured bill to the drawer or an indorser is, in point of form, deemed a sufficient notice of dishonour.

(7) A written notice need not be signed, and an insufficient written notice may be supplemented and validated by verbal communication. A mis-description of the bill shall not vitiate the notice unless the party to whom the notice is given is in fact misled thereby.

(8) Where notice of dishonour is required to be given to any person, it may be given either to the party himself, or to his agent in that behalf.

(9) Where the drawer or indorser is dead, and the party giving notice knows it, the notice must be given to a personal representative, if such there be, and with the exercise of reasonable diligence he can be found.

(10) Where the drawer or indorser is bankrupt, notice may be given either to the party himself or to the trustee.

(11) Where there are two or more drawers or indorsers who are not partners notice must be given to each of them, unless one of them has authority to receive such notice for the others.

(12) The notice may be given as soon as the bill is dishonoured, and must be given within a reasonable time thereafter.

In the absence of special circumstances notice is not deemed to have been given within a reasonable time, unless —

- (a) Where the person giving and the person to receive notice reside in the same place, the notice is given or sent off in time to reach the latter on the day after the dishonour of the bill.
- (b) Where the person giving and the person to receive notice reside in different places, the notice is sent off on the day after the dishonour of the bill, if there be a post at a convenient hour on that day, and if there be no such post on that day then by the next post thereafter.

(13) Where a bill when dishonoured is in the hands of an agent, he may either himself give notice to the parties liable on the bill, or he may give notice to his principal. If he give notice to his principal, he must do so within the same time as if he were the holder, and the principal upon receipt of such notice has himself the same time for giving notice as if the agent had been an independent holder.

(14) Where a party to a bill receives due notice of dishonour, he has after the receipt of such notice the same period of time for giving notice to antecedent parties that the holder has after the dishonour.

(15) Where a notice of dishonour is duly addressed and posted, the sender is deemed to have given due notice of dishonour, notwithstanding any miscarriage by the post-office.

## 50. Excuses for non-notice and delay.

(1) Delay in giving notice of dishonour is excused where the delay is caused by circumstances beyond the control of the party giving notice, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate the notice must be given with reasonable diligence.

(2) Notice of dishonour is dispensed with —

- (a) When, after the exercise of reasonable diligence, notice as required by this act cannot be given to or does not reach the drawer or indorser sought to be charged :
- (b) By waiver, express or implied. Notice of dishonour may be waived before the time of giving notice has arrived, or after the omission to give due notice :
- (c) As regards the drawer in the following cases, namely, (1) where drawer and drawee are the same person, (2) where the drawee is a fictitious person or a person not having capacity to contract, (3) where the drawer is the person to whom the bill is presented for payment, (4) where the drawee or acceptor is as between himself and the drawer under no obligation to accept or pay the bill, (5) where the drawer has countermanded payment :
- (d) As regards the indorser in the following cases, namely, (1) where the drawee is a fictitious person or a person not having capacity to contract and the indorser was aware of the fact at the time he indorsed the bill, (2) where the indorser is the person to whom the bill is presented for payment, (3) where the bill was accepted or made for his accommodation.

**51. Noting or protest of bill.**

(1) Where an inland bill has been dishonoured it may, if the holder think fit, be noted for non-acceptance or non-payment, as the case may be; but it shall not be necessary to note or protest any such bill in order to preserve the recourse against the drawer or indorser.

(2) Where a foreign bill, appearing on the face of it to be such, has been dishonoured by non-acceptance it must be duly protested for non-acceptance, and where such a bill, which has not been previously dishonoured by non-acceptance, is dishonoured by non-payment it must be duly protested for non-payment. If it be not so protested the drawer and indorsers are discharged. Where a bill does not appear on the face of it to be a foreign bill, protest thereof in case of dishonour is unnecessary.

(3) A bill which has been protested for non-acceptance may be subsequently protested for non-payment.

(4) Subject to the provisions of this Act, when a bill is noted or protested, it must be noted on the day of its dishonour. When a bill has been duly noted, the protest may be subsequently extended as of the date of the noting.

(5) Where the acceptor of a bill becomes bankrupt or insolvent or suspends payment before it matures, the holder may cause the bill to be protested for better security against the drawer and indorsers.

(6) A bill must be protested at the place where it is dishonoured :

Provided that —

(a) When a bill is presented through the post-office, and returned by post dishonoured, it may be protested at the place to which it is returned and on the day of its return if received during business hours, and if not received during business hours, then not later than the next business day :

(b) When a bill drawn payable at the place of business or residence of some person other than the drawee, has been dishonoured by non-acceptance, it must be protested for non-payment at the place where it is expressed to be payable, and no further presentment for payment to, or demand on, the drawee is necessary.

(7) A protest must contain a copy of the bill, and must be signed by the notary making it, and must specify —

(a) The person at whose request the bill is protested :

(b) The place and date of protest, the cause or reason for protesting the bill, the demand made, and the answer given, if any, or the fact that the drawee or acceptor could not be found.

(8) Where a bill is lost or destroyed, or is wrongly detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof.

(9) Protest is dispensed with by any circumstance which would dispense with notice of dishonour. Delay in noting or protesting is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate the bill must be noted or protested with reasonable diligence.

**52. Duties of holder as regards drawee or acceptor.**

(1) When a bill is accepted generally presentment for payment is not necessary in order to render the acceptor liable.

(2) When by the terms of a qualified acceptance presentment for payment is required, the acceptor, in the absence of an express stipulation to that effect, is not discharged by the omission to present the bill for payment on the day that it matures.

(3) In order to render the acceptor of a bill liable it is not necessary to protest it, or that notice of dishonour should be given to him.

(4) Where the holder of a bill presents it for payment, he shall exhibit the bill to the person from whom he demands payment, and when a bill is paid the holder shall forthwith deliver it up to the party paying it.

### *Liabilities of Parties.*

#### **53. Funds in hands of drawee.**

(1) A bill, of itself, does not operate as an assignment of funds in the hands of the drawee available for the payment thereof, and the drawee of a bill who does not accept as required by this Act is not liable on the instrument. This sub-section shall not extend to Scotland.

(2) In Scotland, where the drawee of a bill has in his hands funds available for the payment thereof, the bill operates as an assignment of the sum for which it is drawn in favor of the holder, from the time when the bill is presented to the drawee.

#### **54. Liability of acceptor.**

The acceptor of a bill, by accepting it—

(1) Engages that he will pay it according to the tenor of his acceptance :

(2) Is precluded from denying to a holder in due course :

(a) The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the bill ;

(b) In the case of a bill payable to drawer's order, the then capacity of the drawer to indorse, but not the genuineness or validity of his indorsement ;

(c) In the case of a bill payable to the order of a third person, the existence of the payee and his then capacity to indorse, but not the genuineness or validity of his indorsement.

#### **55. Liability of drawer or indorser.**

(1) The drawer of a bill by drawing it—

(a) Engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonoured he will compensate the holder or any indorser who is compelled to pay it, provided that the requisite proceedings on dishonour be duly taken ;

(b) Is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse.

(2) The indorser of a bill by indorsing it—

(a) Engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonoured he will compensate the holder or a subsequent indorser who is compelled to pay it, provided that the requisite proceedings on dishonour be duly taken ;

(b) Is precluded from denying to a holder in due course the genuine-

ness and regularity in all respects of the drawer's signature and all previous indorsements ;

- (c) Is precluded from denying to his immediate or a subsequent indorsee that the bill was at the time of his indorsement a valid and subsisting bill, and that he had then a good title thereto.

#### **56. Stranger signing bill liable as indorser.**

Where a person signs a bill otherwise than as drawer or acceptor, he thereby incurs the liabilities of an indorser to a holder in due course.

#### **57. Measure of damages against parties to dishonoured bill.**

Where a bill is dishonoured, the measure of damages, which shall be deemed to be liquidated damages, shall be as follows:

(1) The holder may recover from any party liable on the bill, and the drawer who has been compelled to pay the bill may recover from the acceptor, and an indorser who has been compelled to pay the bill may recover from the acceptor or from the drawer, or from a prior indorser —

(a) The amount of the bill:

(b) Interest thereon from the time of presentment for payment if the bill is payable on demand, and from the maturity of the bill in any other case :

(c) The expenses of noting, or, when protest is necessary, and the protest has been extended, the expenses of protest.

(2) In the case of a bill which has been dishonoured abroad, in lieu of the above damages, the holder may recover from the drawer or an indorser, and the drawer or an indorser who has been compelled to pay the bill may recover from any party liable to him, the amount of the re-exchange with interest thereon until the time of payment.

(3) Where by this Act interest may be recovered as damages, such interest may, if justice require it, be withheld wholly or in part, and where a bill is expressed to be payable with interest at a given rate, interest as damages may or may not be given at the same rate as interest proper.

#### **58. Transferor by delivery and transferee.**

(1) Where the holder of a bill payable to bearer negotiates it by delivery without indorsing it, he is called a "transferor by delivery."

(2) A transferor by delivery is not liable on the instrument.

(3) A transferor by delivery who negotiates a bill thereby warrants to his immediate transferee being a holder for value that the bill is what it purports to be, that he has a right to transfer it, and that at the time of transfer he is not aware of any fact which renders it valueless.

#### *Discharge of Bill.*

#### **59. Payment in due course.**

(1) A bill is discharged by payment in due course by or on behalf of the drawee or acceptor.

"Payment in due course" means payment made at or after the maturity of the bill to the holder thereof in good faith and without notice that his title to the bill is defective.

(2) Subject to the provisions hereinafter contained, when a bill is paid by the drawer or an indorser it is not discharged ; but

- (a) Where a bill payable to, or to the order of, a third party is paid by drawer, the drawer may enforce payment thereof against the acceptor, but may not re-issue the bill :
- (b) Where a bill is paid by an indorser, or where a bill payable to drawer's order is paid by the drawer, the party paying it is remitted to his former rights as regards the acceptor or antecedent parties, and he may, if he thinks fit, strike out his own and subsequent indorsements, and again negotiate the bill.
- (3) Where an accommodation bill is paid in due course by the party accommodated the bill is discharged.

#### **60. Banker paying demand draft whereon indorsement is forged.**

Where a bill payable to order on demand is drawn on a banker, and the banker on whom it is drawn pays the bill in good faith and in the ordinary course of business, it is not incumbent on the banker to show that the indorsement of the payee or any subsequent indorsement was made by or under the authority of the person whose indorsement it purports to be, and the banker is deemed to have paid the bill in due course, although such indorsement has been forged or made without authority.

#### **61. Acceptor the holder at maturity.**

When the acceptor of a bill is or becomes the holder of it at or after its maturity, in his own right, the bill is discharged.

#### **62. Express waiver.**

(1) When the holder of a bill at or after its maturity absolutely and unconditionally renounces his rights against the acceptor the bill is discharged.

The renunciation must be in writing, unless the bill is delivered up to the acceptor.

(2) The liabilities of any party to a bill may in like manner be renounced by the holder before, at, or after its maturity; but nothing in this section shall affect the rights of a holder in due course without notice of the renunciation.

#### **63. Cancellation.**

(1) Where a bill is intentionally cancelled by the holder or his agent, and the cancellation is apparent thereon, the bill is discharged.

(2) In like manner any party liable on a bill may be discharged by the intentional cancellation of his signature by the holder or his agent. In such case any indorser who would have had a right of recourse against the party whose signature is cancelled, is also discharged.

(3) A cancellation made unintentionally, or under a mistake, or without the authority of the holder, is inoperative ; but where a bill or any signature thereon appears to have been cancelled the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake, or without authority.

#### **64. Alteration of bill.**

(1) Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided except as against a party who

has himself made, authorised, or assented to the alteration, and subsequent indorsers.

Provided that,

Where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hand of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenor.

(2) In particular the following alterations are material, namely, any alteration of the date, the sum payable, the time of payment, the place of payment, and, where a bill has been accepted generally, the addition of a place of payment without the acceptor's assent.

*Acceptance and Payment for Honour.*

**65. Acceptance for honour supra protest.**

(1) Where a bill of exchange has been protested for dishonour by non-acceptance, or protested for better security, and is not overdue, any person, not being a party already liable thereon, may, with the consent of the holder, intervene and accept the bill supra protest for the honour of any party liable thereon, or for the honour of the person for whose account the bill is drawn.

(2) A bill may be accepted for honour for part only of the sum for which it is drawn.

(3) An acceptance for honour supra protest in order to be valid must —

(a) Be written on the bill, and indicate that it is an acceptance for honour:

(b) Be signed by the acceptor for honour.

(4) Where an acceptance for honour does not expressly state for whose honour it is made, it is deemed to be an acceptance for the honour of the drawer.

(5) Where a bill payable after sight is accepted for honour, its maturity is calculated from the date of the noting for non-acceptance, and not from the date of the acceptance for honour.

**66. Liability of acceptor for honour.**

(1) The acceptor for honour of a bill by accepting it engages that he will, on due presentment, pay the bill according to the tenor of his acceptance, if it is not paid by the drawee, provided it has been duly presented for payment, and protested for non-payment, and that he receives notice of these facts.

(2) The acceptor for honour is liable to the holder and to all parties to the bill subsequent to the party for whose honour he has accepted.

**67. Presentment to acceptor for honour.**

(1) Where a dishonoured bill has been accepted for honour supra protest, or contains a reference in case of need, it must be protested for non-payment before it is presented for payment to the acceptor for honour, or referee in case of need.

(2) Where the address of the acceptor for honour is in the same place where the bill is protested for non-payment, the bill must be presented to him not later than the day following its maturity; and where the address of the acceptor for honour is in some place other than the place where it was protested for non-payment, the bill must be forwarded not later than the day following its maturity for presentment to him.

(3) Delay in presentment or non-presentment is excused by any circum-

stance which would excuse delay in presentment for payment or non-presentment for payment.

(4) When a bill of exchange is dishonoured by the acceptor for honour it must be protested for non-payment by him.

### 68. Payment for honour supra protest.

(1) Where a bill has been protested for non-payment, any person may intervene and pay it supra protest for the honour of any party liable thereon, or for the honour of the person for whose account the bill is drawn.

(2) Where two or more persons offer to pay a bill for the honour of different parties, the person whose payment will discharge most parties to the bill shall have the preference.

(3) Payment for honour supra protest, in order to operate as such and not as a mere voluntary payment, must be attested by a notarial act of honour which may be appended to the protest or form an extension of it.

(4) The notarial act of honour must be founded on a declaration made by the payer for honour, or his agent in that behalf, declaring his intention to pay the bill for honour, and for whose honour he pays.

(5) Where a bill has been paid for honour, all parties subsequent to the party for whose honour it is paid are discharged, but the payer for honour is subrogated for, and succeeds to both the rights and duties of, the holder as regards the party for whose honour he pays, and all parties liable to that party.

(6) The payer for honour, on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonour, is entitled to receive both the bill itself and the protest. If the holder do not on demand deliver them up, he shall be liable to the payer for honour in damages.

(7) Where the holder of a bill refuses to receive payment supra protest he shall lose his right of recourse against any party who would have been discharged by such payment.

### *Lost Instruments.*

### 69. Holder's right to duplicate of lost bill.

Where a bill has been lost before it is overdue, the person who was the holder of it may apply to the drawer to give him another bill of the same tenor, giving security to the drawer if required to indemnify him against all persons whatever in case the bill alleged to have been lost shall be found again.

If the drawer on request as aforesaid refuses to give such duplicate bill, he may be compelled to do so.

### 70. Action on lost bill.

In any action or proceeding upon a bill, the court or a judge may order that the loss of the instrument shall not be set up, provided an indemnity be given to the satisfaction of the court or judge against the claims of any other person upon the instrument in question.

### *Bill in a Set.*

### 71. Rules as to sets.

(1) Where a bill is drawn in a set, each part of the set being numbered, and containing a reference to the other parts, the whole of the parts constitute one bill.



(2) Where the holder of a set indorses two or more parts to different persons, he is liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed as if the said parts were separate bills.

(3) Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is as between such holders deemed the true owner of the bill; but nothing in this sub-section shall affect the rights of a person who in due course accepts or pays the part first presented to him.

(4) The acceptance may be written on any part, and it must be written on one part only.

If the drawee accepts more than one part, and such accepted parts gets into the hands of different holders in due course, he is liable on every such part as if it were a separate bill.

(5) When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereof.

(6) Subject to the preceding rules, where any one part of a bill drawn in a set is discharged by payment or otherwise, the whole bill is discharged.

#### *Conflict of Laws.*

### **72. Rules where laws conflict.**

Where a bill drawn in one country is negotiated, accepted, or payable in another, the rights, duties, and liabilities of the parties thereto are determined as follows:—

(1) The validity of a bill as regards requisites in form is determined by the law of the place of issue, and the validity as regards requisites in form of the supervening contracts, such as acceptance, or indorsement, or acceptance supra protest, is determined by the law of the place where such contract was made.

Provided that—

(a) Where a bill is issued out of the United Kingdom it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue:

(b) Where a bill, issued out of the United Kingdom, conforms, as regards requisites in form, to the law of the United Kingdom, it may, for the purpose of enforcing payment thereof, be treated as valid as between all persons who negotiate, hold, or become parties to it in the United Kingdom.

(2) Subject to the provisions of this Act, the interpretation of the drawing, indorsement, acceptance, or acceptance supra protest of a bill, is determined by the law of the place where such contract is made.

Provided that where an inland bill is indorsed in a foreign country the indorsement shall as regards the payer be interpreted according to the law of the United Kingdom.

(3) The duties of the holder with respect to presentment for acceptance or payment and the necessity for or sufficiency of a protest or notice of dishonour, or otherwise, are determined by the law of the place where the act is done or the bill is dishonoured.

(4) Where a bill is drawn out of but payable in the United Kingdom and the

sum payable is not expressed in the currency of the United Kingdom, the amount shall, in the absence of some express stipulation, be calculated according to the rate of exchange for sight drafts at the place of payment on the day the bill is payable.

(5) Where a bill is drawn in one country and is payable in another, the due date thereof is determined according to the law of the place where it is payable.

### PART III.

#### CHEQUES ON A BANKER.

##### 73. Cheque defined.

A cheque is a bill of exchange drawn on a banker payable on demand.

Except as otherwise provided in this Part, the provisions of this Act applicable to a bill of exchange payable on demand apply to a cheque.

##### 74. Presentment of cheque for payment.

Subject to the provisions of this Act —

(1) Where a cheque is not presented for payment within a reasonable time of its issue, and the drawer or the person on whose account it is drawn had the right at the time of such presentment as between him and the banker to have the cheque paid and suffers actual damage through the delay, he is discharged to the extent of such damage, that is to say, to the extent to which such drawer or person is a creditor of such banker to a larger amount than he would have been had such cheque been paid.

(2) In determining what is a reasonable time regard shall be had to the nature of the instrument, the usage of trade and of bankers, and the facts of the particular case.

(3) The holder of such cheque as to which such drawer or person is discharged shall be a creditor, in lieu of such drawer or person, of such banker to the extent of such discharge, and entitled to recover the amount from him.

##### 75. Revocation of banker's authority,

The duty and authority of a banker to pay a cheque drawn on him by his customer are determined by —

- (1) Countersignature of payment :
- (2) Notice of customer's death.

#### *Crossed Cheques.*

##### 76. General and special crossings defined.

(1) Where a cheque bears across its face an addition of — (a) the words “and company” or any abbreviation thereof between two parallel transverse lines, either with or without the words “not negotiable ;” or (b) two parallel transverse lines simply, either with or without the words “not negotiable,—” that addition constitutes a crossing, and the cheque is crossed generally.

(2) Where a cheque bears across its face an addition of the name of a banker, either with or without the words “not negotiable,” that addition constitutes a crossing, and the cheque is crossed specially and to that banker.

##### 77. Crossing by drawer or after issue.

- (1) A cheque may be crossed generally or specially by the drawer.

(2) Where a cheque is uncrossed, the holder may cross it generally or specially.

(3) Where a cheque is crossed generally the holder may cross it specially.

(4) Where a cheque is crossed generally or specially, the holder may add the words "not negotiable."

(5) Where a cheque is crossed specially, the banker to whom it is crossed may again cross it specially to another banker for collection.

(6) Where an uncrossed cheque, or a cheque crossed generally, is sent to a banker for collection, he may cross it specially to himself.

#### **78. Crossing a material part of check.**

A crossing authorized by this Act is a material part of the cheque; it shall not be lawful for any person to obliterate or, except as authorized by this Act, to add to or alter the crossing.

#### **79. Duties of banker as to crossed cheques.**

(1) Where a cheque is crossed specially to more than one banker except when crossed to an agent for collection being a banker, the banker on whom it is drawn shall refuse payment thereof.

(2) Where the banker on whom a cheque is drawn which is so crossed nevertheless pays the same, or pays a cheque crossed generally otherwise than to a banker, or if crossed specially otherwise than to the banker to whom it is crossed, or his agent for collection being a banker, he is liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid.

Provided that where a cheque is presented for payment which does not at the time of presentment appear to be crossed, or to have had a crossing which has been obliterated, or to have been added to or altered otherwise than as authorised by this Act, the banker paying the cheque in good faith and without negligence shall not be responsible or incur any liability, nor shall the payment be questioned by reason of the cheque having been crossed, or of the crossing having been obliterated or having been added to or altered otherwise than as authorised by this Act, and of payment having been made otherwise than to a banker or to the banker to whom the cheque is or was crossed, or to his agent for collection being a banker, as the case may be.

#### **80. Protection to banker and drawer where cheque is crossed.**

Where the banker, on whom a crossed cheque is drawn, in good faith and without negligence pays it, if crossed generally, to a banker, and if crossed specially, to the banker to whom it is crossed, or his agent for collection being a banker, the banker paying the cheque, and, if the cheque has come into the hands of the payee, the drawer, shall respectively be entitled to the same rights and be placed in the same position as if payment of the cheque had been made to the true owner thereof.

#### **81. Effect of crossing on holder.**

Where a person takes a crossed cheque which bears on it the words "not negotiable," he shall not have and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had.

#### **82. Protection to collecting banker.** [*Amended 1906. See post, p. 873.*]

Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the

customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment.

#### PART IV.

##### PROMISSORY NOTES.

##### 83. Promissory note defined.

(1) A promissory note is an unconditional promise in writing made by one person to another signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person or to bearer.

(2) An instrument in the form of a note payable to maker's order is not a note within the meaning of this section unless and until it is indorsed by the maker.

(3) A note is not invalid by reason only that it contains also a pledge of collateral security with authority to sell or dispose thereof.

(4) A note which is, or on the face of it purports to be, both made and payable within the British Islands is an inland note. Any other note is a foreign note.

##### 84. Delivery necessary.

A promissory note is inchoate and incomplete until delivery thereof to the payee or bearer.

##### 85. Joint and several notes.

(1) A promissory note may be made by two or more makers, and they may be liable thereon jointly, or jointly and severally according to its tenor.

(2) Where a note runs "I promise to pay" and is signed by two or more persons it is deemed to be their joint and several note.

##### 86. Note payable on demand.

(1) Where a note payable on demand has been indorsed, it must be presented for payment within a reasonable time of the indorsement. If it be not so presented the indorser is discharged.

(2) In determining what is a reasonable time, regard shall be had to the nature of the instrument, the usage of trade and the facts of the particular case.

(3) Where a note payable on demand is negotiated, it is not deemed to be overdue, for the purpose of affecting the holder with defects of title of which he had no notice, by reason that it appears that a reasonable time for presenting it for payment has elapsed since its issue.

##### 87. Presentment of note for payment.

(1) Where a promissory note is in the body of it made payable at a particular place, it must be presented for payment at that place in order to render the maker liable. In any other case, presentment for payment is not necessary in order to render the maker liable.

(2) Presentment for payment is necessary in order to render the indorser of a note liable.

(3) Where a note is in the body of it made payable at a particular place,

presentment at that place is necessary in order to render an indorser liable; but when a place of payment is indicated by way of memorandum only, presentment at that place is sufficient to render the indorser liable, but a presentment to the maker elsewhere, if sufficient in other respects, shall also suffice.

### 88. Liability of maker.

The maker of a promissory note by making it—

- (1) Engages that he will pay it according to its tenor;
- (2) Is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse.

### 89. Application of Part II to notes.

(1) Subject to the provisions in this Part, and except as by this section provided, the provisions of this Act relating to bills of exchange apply, with the necessary modifications, to promissory notes.

(2) In applying those provisions the maker of a note shall be deemed to correspond with the acceptor of a bill, and the first indorser of a note shall be deemed to correspond with the drawer of an accepted bill payable to drawer's order.

(3) The following provisions as to bills do not apply to notes; namely, provisions relating to—

- (a) Presentment for acceptance;
- (b) Acceptance;
- (c) Acceptance *supra protest*;
- (d) Bills in a set.

(4) Where a foreign note is dishonoured, protest thereof is unnecessary.

## PART V.

### SUPPLEMENTARY.

### 90. Good faith.

A thing is deemed to be done in good faith, within the meaning of this Act, where it is in fact done honestly, whether it is done negligently or not.

### 91. Signature.

(1) Where, by this Act, any instrument or writing is required to be signed by any person, it is not necessary that he should sign it with his own hand, but it is sufficient if his signature is written thereon by some other person by or under his authority.

(2) In the case of a corporation, where by this Act any instrument or writing is required to be signed, it is sufficient if the instrument or writing be sealed with the corporate seal.

But nothing in this section shall be construed as requiring the bill or note of a corporation to be under seal.

### 92. Computation of time.

Where, by this Act, the time limited for doing any act or thing is less than three days, in reckoning time, non-business days are excluded.

“Non-business days” for the purposes of this Act mean—

- (a) Sunday, Good Friday, Christmas Day:

(b) A bank holiday under the Bank Holidays Act, 1871, or acts amending it :

(c) A day appointed by Royal proclamation as a public fast or thanksgiving day.

Any other day is a business day.

### 93. When noting equivalent to protest.

For the purposes of this Act, where a bill or note is required to be protested within a specified time or before some further proceeding is taken, it is sufficient that the bill has been noted for protest before the expiration of the specified time or the taking of the proceeding ; and the formal protest may be extended at any time thereafter as of the date of the noting.

### 94. Protest when notary not accessible.

Where a dishonoured bill or note is authorized or required to be protested, and the services of a notary cannot be obtained at the place where the bill is dishonoured, any householder or substantial resident of the place may, in the presence of two witnesses, give a certificate, signed by them, attesting the dishonour of the bill, and the certificate shall in all respects operate as if it were a formal protest of the bill.

The form given in Schedule 1 to this Act may be used with necessary modifications, and if used shall be sufficient.

### 95. Dividend warrants may be crossed.

The provisions of this Act as to crossed cheques shall apply to a warrant for payment of dividend.

### 96. Repeal.

The enactments mentioned in the second schedule to this Act are hereby repealed as from the commencement of this Act to the extent in that schedule mentioned.

Provided that such repeal shall not affect anything done or suffered, or any right, title, or interest acquired or accrued before the commencement of this Act, or any legal proceeding or remedy in respect of any such thing, right, title, or interest.

### 97. Savings.

(1) The rules in bankruptcy relating to bills of exchange, promissory notes, and cheques, shall continue to apply thereto notwithstanding anything in this Act contained.

(2) The rules of common law including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to bills of exchange, promissory notes, and cheques.

(3) Nothing in this Act or in any repeal effected thereby shall affect —

(a) The provisions of the Stamp Act, 1870,\* or acts amending it, or any law or enactment for the time being in force relating to the revenue :

(b) The provisions of the Companies Act, 1862,† or acts amending it, or any act relating to joint stock banks or companies :

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\* 33 and 34 V/ct. c. 97.

† 25 and 26 Vict. c. 89.

- (c) The provisions of any act relating to or confirming the privileges of the Bank of England or the Bank of Ireland respectively :
- (d) The validity of any usage relating to dividend warrants, or the indorsements thereof.

### 98. Saving of summary diligence in Scotland.

Nothing in this Act or in any repeal effected thereby shall extend or restrict, or in any way alter or affect the law and practice in Scotland in regard to summary diligence.

### 99. Construction with other acts, etc.

Where any act or document refers to any enactment repealed by this Act, the act or document shall be construed, and shall operate, as if it referred to the corresponding provisions of this Act.

### 100. Parol evidence in judicial proceedings in Scotland.

In any judicial proceeding in Scotland, any fact relating to a bill of exchange, bank cheque, or promissory note, which is relevant to any question of liability thereon, may be proved by parol evidence: Provided that this enactment shall not in any way affect the existing law and practice whereby the party who is, according to the tenor of any bill of exchange, bank cheque, or promissory note, debtor to the holder in the amount thereof, may be required, as a condition of obtaining a sist of diligence, or suspension of a charge, or threatened charge, to make such consignment, or to find such caution as the court or judge before whom the cause is depending may require.

This section shall not apply to any case where the bill of exchange, bank cheque, or promissory note has undergone the sesennial prescription.

#### FIRST SCHEDULE.\* (Sec. 94.)

Form of protest which may be used when the services of a notary cannot be obtained.

Know all men that I, A. B. (householder), of \_\_\_\_\_ in the county of \_\_\_\_\_, in the United Kingdom, at the request of C. D., there being no notary public available, did on the \_\_\_\_\_ day of \_\_\_\_\_ 188 \_\_\_\_\_ at \_\_\_\_\_ demand payment (or acceptance) of the bill of exchange hereunder written, from E. F., to which demand he made answer (state answer, if any). Wherefore, I now in the presence of G. H. and J. K. do protest the said bill of exchange.

(Signed)

A. B.

G. H. }  
J. K. } Witnesses.

N. B. — The bill itself should be annexed, or a copy of the bill and all that is written thereon should be underwritten.

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\* The other schedules are purely local in interest, and are therefore omitted.—ED.

BILLS OF EXCHANGE (CROSSED CHEQUES) ACT, 1906.<sup>1</sup>

6 EDW. 7, c. 17.

AN ACT to amend section eighty-two of the Bills of Exchange Act, 1882. 4th August, 1906.

SEC. 1. A banker receives payment of a crossed cheque for a customer within the meaning of section eighty-two of the Bills of Exchange Act, 1882, notwithstanding that he credits his customer's account with the amount of the cheque before receiving payment thereof.

SEC. 2. This act may be cited as the Bills of Exchange (Crossed Cheques) Act, 1906, and this act and the Bills of Exchange Act, 1882, may be cited together as the Bills of Exchange Acts, 1882 and 1906.

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<sup>1</sup> "NOTE.— This act was passed to get rid of the decision in *Capital and Counties Bank v. Gordon*, A. C. (1893), 240, H. L., where it was held that if a bank received a crossed cheque from a customer, and at once credited his account with the amount, the bank became holders for value of the cheque, and in receiving payment thereof, received it on their own account, and not merely as agents for collection on behalf of their customer. They therefore did not come within the protection given by section 82 of the act of 1882 to collecting bankers. . . ." Chalmers, *A Digest of the Law of Bills of Exchange*, etc., 7th ed., p. 400.— C.





# INDEX.

[The "§" references are to the sections of the New York Negotiable Instrument Law ; other references are to pages.]

## Acceptance: (See NON-ACCEPTANCE.)

definition and effect, 403-418, § 2, § 112.  
form and effect, 648-668, §§ 220-225.  
writing and signature, 648-649, § 220.  
parol, 649n, 668.  
only by drawee, 649-650, § 220.  
delivery necessary, 650.  
promise to accept, 654-657, § 223.  
by refusal to return bill, 646, 658-665, § 225.  
of incomplete or dishonored bill, 666-668, § 226.  
time allowed for, 660-665, § 224.  
kinds of, 668-678, §§ 227-229.  
general acceptance, 668-673, § 228.  
qualified acceptance, 673-678, § 229.  
conditional, 673-674, § 229.  
partial, 675, § 229.  
local, 675-676, § 229.  
qualified as to time, 676, § 229.  
by part of drawees, 676, § 229.  
effect of qualified acceptance, 677-678, § 230.  
of bills in a set, 709-710, § 313.

## Acceptance for honor:

when allowed, 701, § 280.  
parties to, 701, § 280.  
for what amount, § 280.  
formal requisites, 701, § 281.  
protest for non-acceptance, 701, § 280.  
writing and signature, § 281.

### interpretation,

for whose honor, § 282.  
effect on maturity of bill, § 285.

### contract of acceptor for honor,

terms of, 649, 703, 705, § 284.  
in whose favor, § 283.  
admissions by, 704.

### proceedings subsequent to,

presentment to drawee and protest, 701-702, 705-706, § 284, 286.  
presentment to acceptor for honor, 703, 705-706, § 287.  
excuse for delay, 704-706, § 288.  
protest for non-payment by acceptor for honor, § 289.

## Acceptor:

consideration, 250-251.  
liability of, 403, § 112.  
admissions of, 403-418, § 112.  
only drawee can be, 642-643, 649-650, § 220.  
presentment not necessary to charge, 477-480.

## Acceptor for honor:

liability of, 649, 703, 705, § 283.  
admissions of, 704.  
who may be, § 280.

## Accommodation Paper:

accommodation party,  
corporation as, 256.  
defined, 255, 257-258, § 55.  
liability to holder, 254-258, § 55.  
notice when maker is, 256, 579, § 186.  
order of liability of, 459-465.  
accommodated party,  
not entitled to presentment, § 140.  
not entitled to notice, 579, § 186.  
payment by, 597-598, 640-641, §§ 200-202.  
transfer by, after maturity, 323-335.  
release of, 631n.  
consideration for, 243-244.  
amount recoverable on, 361-362.  
payment of supra protest, 708n.

## Action on Negotiable Paper:

defined, § 2.  
transfer for purpose of, 316n.  
bringing, is a demand, 477.  
by restrictive indorsee, 280-284, § 67.  
between indorsers, 459-466.  
upon instrument payable to bearer, 260.  
after dishonor for non-acceptance, 690, § 248.  
on bills in a set, 713n.  
against agent signing without authority, 216-219.  
upon warranties in sale, 418-442.  
upon guaranty, 471-474.  
upon original consideration, 610-612.  
to recover money paid on forged paper, 403-418.

## Additional Act:

provision for, renders instrument non-negotiable, 90-91, § 24.  
exceptions to rule, 91-96, § 24.

## Administrator: (See EXECUTOR.)

## Admissions:

by maker, 401-402, § 110.  
by acceptor, 403-418, § 112.  
by drawer, 418-419, § 111.  
by indorser, see WARRANTY.

## Agent:

signature by, 197-220, 516, 650n, §§ 38-40.  
liability of, 197-220, 441-442, § 39.  
presentment by, 480, § 132.  
presentment to, 516.  
acceptance by, 650n.  
notice of dishonor by, 533-539, §§ 162, 165.  
notice of dishonor to, § 168.  
indorsement for collection to, 274-277, 280-284, 439-440, §§ 66, 67.  
drawing on principal, 654-657.

## Allonge:

nature and use of, 266-267, 308, § 61.

**Alteration:**

- effect of, 373n, 608-626, §§ 205, 206.
- recovery on instrument as before alteration, 157, 610, 625, 726, § 205.
- through negligence of maker, 624-626.
- of indorser, 616-624.
- material, 610n, § 206.
- burden of proof, 610n.
- innocent, 611-614.
- by form of acceptance, 668-673.

**Alternative Parties:**

- payees, whether allowed, 118-120.
- drawees, whether allowed, 642-643.
- makers, whether allowed, 643n.

**Ambiguity:**

- of language in instrument, 192-197, § 36.
- of signatures to instruments, 197-220, § 36.

**Ambiguous Instrument:**

- construction of, 148-150, 192-197, § 36.
- may be treated as bill or note, 150, § 36.

**Amount:**

- must be certain, 61-80, §§ 20-21.
- recoverable, 252-254, 361-364, 594-597, §§ 53, 96.

**Antecedent Debt:**

- is valuable consideration, 239-249, §§ 50-51.
- accommodation paper, 243-244.

**Assignee: (See BANKRUPT.)****Assignment:**

- indorsement by, 261-263.
- qualified indorsement is, 284, § 67.
- transfer without indorsement, 307-310, § 79.
- of guaranties, 471-474.
- of funds, bill is not, 644-646, § 211.
- check is not, 752-758, § 325.
- for benefit of creditors, protest for better security, § 266.

**Attorney's Fees:**

- provision for, does not render sum uncertain, 78-80, § 21.

**Bad Faith:**

- equivalent to knowledge, 337-360, § 95.
- undervalue as evidence of, 337-340.

**Bank: (See CHECKS.)**

- definition of, § 2.
- cashier as payee or indorsee, 216n, 299-300, § 72.
- bill or note payable at,
  - presentment of, 495-504, 524-527, § 135.
  - is an order on, § 147.
  - not by mere notice, 512-513.
  - notice of dishonor, 537-538, 561-565.
- certificate of deposit, 43.
- savings bank order by, 46-48.
- draft by, 725n.

**Bank Book:**

- condition of return of, 43-48.

**Bank Notes:**

- history of, 29.
- whether current money, 84-85.
- whether demand necessary, 478n.

**Bankrupt:**

- notice of dishonor to, 548n. 579, 696-698, § 172.
- presentment for acceptance to, § 242.
- protest for better security against, § 266.
- discharge of, does not discharge instrument, 628n.

**Bearer:**

- defined, 122, § 2.
- bill or note payable to, 123-148, 260-261, §§ 20, 28.
- instrument indorsed in blank payable to, § 64.
- indorsement of instrument payable to, 288-297, § 70.

**Better Security:**

- protest for, § 266.

**Bills of Exchange:**

- history, 24-31.
- form, 158-159, 642, § 210.
- general requisites, see FORM OF NEGOTIABLE INSTRUMENTS.
- drawee, 148-150, 642-643, §§ 20, 212.
- referee in case of need, 643-644, § 215.
- interpretation, see INTERPRETATION.
- bill not an assignment of funds, 644-646, § 211.
- inland and foreign bills, 646-647, § 213.
- distinguished from check, 722-724, § 321.

**Bills of Exchange Act:**

- text of, 845-873.
- origin of, 3-8.
- construction of, 5, 126, 396-397.

**Bills in a Set:**

- when treated as one bill, 709, 710-713, § 310.
- negotiation of parts to different persons, 709-710, § 311.
- rights of holder, § 311.
- liability of indorsers, § 312.
- acceptance of, 709-710, § 313.
- payment of, 710, § 314.
- discharge of, § 315.
- copies distinguished, 710-711.

**Blank Indorsement: (See INDORSEMENT.)**

- instrument payable to bearer, 144-148, § 28.
- definition and effect, 268-271, § 65.
- converted into special, 268-270, § 65.

**Blanks:**

- when blanks may be filled, 107-111, 163-192, 319-320, §§ 32-34.
- distinguished from spaces, 616-624.
- as notice of defects, 319-320, § 91.

**Bona-fide Holder: (See HOLDER IN DUE COURSE.)****Bonds:**

- when negotiable, 31-33, 419-431.
- how made non-negotiable, § 332.
- public or corporate, § 115.

**Broker: (See AGENT.)****Burden of proof:**

- when on holder to prove he is holder in due course, 365-370, 374-375, § 98.
- to show mistake in cancellation, 627, § 204.
- to show alteration, 610n.
- to show that instrument was transferred when overdue, 302.

**Cancellation:**

- intentional, 373, 599, §§ 200, 204.
- unintentional, 605-608, § 204.
- burden of proof, 627, § 204.

**Capacity of Parties:**

- to indorse, 220, 221, § 41.
- admissions of, 401-418, §§ 110-112.
- warranty of, 434, §§ 115-116.
- incapacity as a defense, 372, 475.
- drawee, 575, §§ 214, 245.

**Cashier:**

indorsement, when payable to, 216n, 299-300, § 72.

**Certainty:**

of sum payable, 61-80, §§ 20, 21.  
of promise, 46-61, §§ 20, 22.  
of time, 96-106, § 23  
of parties,  
drawee, 148-150, § 20.  
payee, 107-113, § 27.

**Certificate of Deposit:**

negotiability of, 43-44n.  
demand necessary, 477n.  
distinguished from deposit slip, 43n-44n.  
distinguished from savings bank order, 46-48.

**Certificate of Protest:**

form and contents, 691-698, § 261.  
correction of, 508-509.  
as to presentment for acceptance, 685, 694-695.  
as evidence of notice of dishonor, 589-590.

**Certification of Check:**

effect upon drawer's liability, 743-748, § 324.  
effect upon indorser's liability, 748-751, § 324.

**Checks:**

defined, § 321.  
distinguished from bills, 722-725.  
presentment for payment,  
effect of delay upon drawer's liability, 725-734, § 322.  
upon indorser's liability, 734-743.

**Certification:** (See CERTIFICATION OF CHECK.)

liability of drawee,  
to holder, 752-758, § 325.  
to drawer for wrongful dishonor, 772-774.

**Codes:**

American, 9-13, 779-841.  
Continental, 13-15.  
English, 3-9, 845-873.  
construction of, 5, 12, 396, 451.

**Collateral Security:**

authorizing sale of, does not render instrument non-negotiable, 91-92, § 24.  
instrument issued as, is contingent, 105-106.  
instrument transferred, as for antecedent debt, 239-249, § 51.  
failure to sell, 633-634.

**Collection:**

bill or note payable with costs of, 78-80, § 21.  
indorsement for, 274-277, 280-284, §§ 66-67.  
of check, time allowed, 725-751.

**Conditional:** (See UNCONDITIONAL.)

orders or promises, 46-61, §§ 20, 22.  
delivery, 151-152, § 35.  
indorsement, 287, § 69.  
acceptance, 673-674, § 229.

**Consideration:**

necessity of, 235n.  
presumption of, 234-239, 716-720, § 50.  
adequacy of, 235n, 337-340.  
what constitutes, § 51.  
payment of pre-existing debt, 240.  
collateral security for pre-existing debt, 239-249.  
in accommodation paper, 243-244, § 20.  
effect of want or failure of, 253-254, § 54.  
need not be specified, 158, 159, § 25.  
for acceptor's promise, 250-251.  
by preceding holder, 249-251, § 52.

**Consideration** — Continued.

action upon original, 610n, 611-614.  
statement of, does not render conditional, 55-61, § 22.  
in restrictive indorsement, 277-280.  
in transfer in trust, 277-280.  
patent right as, 384n-385n, § 330.  
speculative, § 331.

**Construction:**

of ambiguous instruments, 161-220, § 36.  
of codifying statutes, 5, 12, 396, 451.

**Constructive Notice:**

from form of paper, 345-357.

**Contingency:**

instrument payable on, not negotiable, 46-49, 103-106, §§ 22, 24.  
what is not, 50-61.

**Contribution:**

among sureties, 461-462.

**Copy of Bill:**

use in protest of, 691-695, § 261.  
negotiating copy, 710.

**Corporation:**

as accommodation indorser, 256.  
indorsement by, 221, § 41.  
payee a fiscal officer of, § 72.  
seal of, on corporate paper, 160n.  
paper of, diverted by officer, 346-354.  
signature by officers of, 199-216.  
paper of, indorsed by directors, 577-579.

**Costs:**

provision for costs of collection does not render sum uncertain, 78-80, § 21.  
of prior suit, whether recoverable by surety, 364.

**Coverture:**

as a defense, 372.  
transfer after, 628n.  
note signed by married women, 434.

**Currency:**

whether treated as money, 83n.

**Current Funds:**

whether treated as money, 82-83.

**Current Money:**

particular kind may be specified, 85-89, § 5.  
what constitutes, 82-89.

**Custom:**

as origin of law merchant, 23-24, 30-31.

**Date:**

non-essential, 158-159, 195, § 25.  
presumption as to, 195, §§ 30, 36.  
mistake in, 161-162.  
ante-dated and post-dated instruments, 161-168, § 31.  
when date may be inserted, 163-168, § 32.  
change of, a material alteration, § 206.  
on or before fixed, 97-98.  
alteration of, § 206.  
of acceptance, § 226.  
post-dated check, 724n.

**Day:** (See TIME.)**Death:** (See EXECUTOR.)

of party primarily liable, 357n, 516-517, 576n, 694-695, § 136.  
of drawer or indorser, 546-548, §§ 169-170.  
of drawee before acceptance, § 245.  
instrument payable at or after, 102-103, 234-235, 716-720.

**Default:**

in payment of installment, 72-74, § 21.

**Defenses:**

absolute, 372n, 372-374.  
 conditional or personal, 373n, 373-374, §§ 54, 93-94, 97.  
 burden of proof, see **BURDEN OF PROOF**.  
 defenses to negotiable instruments,  
 alteration, 373n, 608-626, § 205.  
 cancellation, 373n, 599-608, §§ 200, 204.  
 discharge in bankruptcy, 373.  
 diversion by agent, 239-243, 346-352.  
 duress, 370-375.  
 failure of consideration, 253-254, 268, 419.  
 forgery, 168, 221-233, 403-418, 441, §§ 33, 42.  
 fraud, 373n, 357-359, 360-361, 476.  
 fraud as to nature of contract, 387-399.  
 garnishment, 373.  
 infancy, 220.  
 illegality, 368-370, 371, 373n, 432.  
 non-demand or notice, 477-480.  
 parol agreement, 270-271.  
 payment, 373n, 591-592, 639-641, §§ 77, 200.  
 set-off, 373n, 320-324, 475.  
 want of consideration, 373n, 337-338.  
 want of delivery, 373n, 152-153.  
 want of delivery as a negotiable instrument, 387-399.  
 want of title in holder, 314-318.  
 defenses to guaranty, 474-476.

**Delay:** (See **DILIGENCE**.)

in making presentment, 97, 518-520, 725-743, § 322.  
 in giving notice, 573-574, § 184.  
 in proceeding against principal, 633-634.  
 in making presentment for acceptance, 681-685, § 241.  
 in making protest, § 267.

**Delivery:**

defined, § 2.  
 when presumed, 154-158, § 35.  
 of incomplete instrument, 386-387, § 34.  
 essential, 151-152, 265n, § 35.  
 conditional, 151-152.  
 want of, as defense, 152-158, 387-399.  
 negotiation by, 342, § 60.  
 warranty in negotiation by, 419-437, § 115.  
 after acceptance, 650.  
 indorsement of paper negotiable by, 443, § 117.  
 upon payment, §§ 134, 306.  
 of notice of dishonor, 542-546, § 167.  
 obtained by trick, 387-399.

**Demand:** (See **PRESENTMENT FOR PAYMENT**.)**Demand Bill or Note:**

when payable on demand, 96-97, §§ 20, 26.  
 when overdue, 323-324, § 92.  
 when presentment for payment must be made, 483-494, § 131.

**Deposit:**

indorsement for, 282-284.

**Deposit Slip:**

distinguished from certificate of deposit, 43n-44n.

**Diligence:** (See **DELAY**.)

in making presentment, 483-504, 704-706, § 142.  
 in giving notice, 548-565, 580, §§ 183, 184.  
 in presenting check, 725-743, § 322.  
 in making protest, § 267.

**Discharge of Instrument:**

payment and retransfer, 591-599, §§ 80, 200.  
 payment in due course, 591-592, § 200.  
 what is payment, 593.  
 payment by indorser, 594-597.  
 payment by party accommodated, 640-641, § 202.  
 payment or purchase, 597-598.  
 cancellation or renunciation, see **CANCELLATION, RENUNCIATION**.  
 alteration, see **ALTERATION**.  
 by operation of law, 628n.  
 of bills in a set, § 315.

**Discharge of Surety:**

what effects, 474-476, 605-608, 629-638, § 201.  
 extension of time, does it discharge?, 631-633, 634-638, §§ 200-201.  
 reservation of rights against, 629-633, § 201.  
 by qualified acceptance, 677-678, § 230.  
 by payment for honor, 707, § 304.  
 by non-presentment for acceptance, 681, § 241.  
 by failure of holder to take necessary steps, § 247.  
 by non-protest, § 260.  
 by payment for honor, § 304.  
 by non-presentment of check, 748-752, § 322.

**Dishonor:** (See **PRESENTMENT; NOTICE; PROTEST**.)

by non-payment, §§ 143, 289.  
 by non-acceptance, §§ 221, 246.  
 notice after, § 160.  
 protest after, §§ 189, 260.  
 acceptance after, 667-668, § 226.  
 action for wrongful dishonor, 772-774.

**Drawee:** (See **ACCEPTANCE**.)

must be certain, 148-151, § 20.  
 in case of need, 643-644, § 215.  
 liability of, 644-646, 752-758, 772-774, §§ 211, 325.  
 joint drawees, 642-643, § 212.  
 alternative or successive, 642-643, § 212.  
 only drawee can accept, 649-650, § 220.  
 fictitious, excuse of steps, 575n, §§ 142, 185, 186.  
 may be also payee, 114-115, § 27.  
 may be also drawer, 113-114, § 27.

**Drawee in Case of Need:** (See **REFEREE IN CASE OF NEED**.)**Drawer:** (See **FORM; PRESENTMENT; NOTICE; PROTEST**.)

contract of, 418, § 111.  
 admissions of, 418-419, § 111.  
 when not entitled to presentment, 520-522, § 139.  
 when not entitled to notice, 575-577, 580-585, § 185.  
 discharge of drawer, §§ 160, 230, 241, 260, 322.  
 payment by, 639-640, § 202.  
 may be payee, § 27.  
 may be drawee, 150.

**Due Bill:**

whether a negotiable instrument, 37-40, 42.

**Duress:**

as a defense, 370-375, § 94.

**Election:**

of holder to require something in lieu of money, 94-96, § 24.

**Escrow:**

delivery in, 151n.

**Estate:** (See EXECUTOR.)

instrument payable to an, 111-113.

**Exchange:**

provision for, does not render sum uncertain, 74-77, § 21.  
note payable in, not negotiable, 81-82.  
recovery of re-exchange, 364n.

**Excuse of Steps:** (See DILIGENCE.)**Executor:**

presentment for payment to, 516-517, 694-695, § 136.  
notice of dishonor to, 547-548, § 169.  
transfer of instrument to maker as, 628n.  
presentment for acceptance to, § 242.  
instrument payable to, 111-113.

**Exemptions:**

waiver of, does not render instrument non-negotiable, 94, § 24.

**Extinguishment:** (See DISCHARGE.)**Failure of Consideration:** (See CONSIDERATION.)

effect of, 253-254, § 54.  
as a defense, 253-254, 268, 419.

**Fictitious Parties:**

payee, instrument payable to bearer, 123-144, § 28.  
drawee, notice excused, 575n, §§ 142, 185, 186.  
bill may be treated as note, § 214.  
presentment excused, 575n, § 142, § 245.

**Figures:**

discrepancy between words and, 192-194 § 36.

**Finder:**

of instrument, right of action, 314.

**Foreign Bills:**

defined, 646-647, § 213.  
require protest, 482, 585, 691n, §§ 189, 260.

**Foreign Money:**

whether treated as money, 88-89.

**Forgery:**

of signatures generally, 221-233, § 42.  
of drawer's signature, 403-418.  
by filling blanks, 168-190, 616-624.  
of indorsement, 433-434, 438.  
of renewal note, 605-608.  
ratification of, 222-223.  
as a defense, 168, 221-233, 403-418, 441, §§ 33, 42.  
warranty against, 438, § 116.

**Form of Negotiable Instruments:**

writing and signature, 34-37, § 20.  
promise or order, 37-61, § 20.  
unconditional, 46-61, § 22.  
certainty,  
of sum, 61-80, § 21.  
of time, 96-106, §§ 23, 26.  
of payee, 107-113, § 27.  
of drawee, 148-150, § 20.  
payable in money, 81-90, § 20.  
no additional act, 90-96, § 24.  
payable to order or bearer, 106-147, §§ 20, 27, 28.  
delivery, 151-158, § 35.  
non-essentials, 158-160, § 25.

**Fraud:**

as a defense, 373n, 357-359, 360-361, 476.  
as to nature of contract, 387-399.  
by seller, 435-437, § 115.

**Fund:**

particular fund designated for reimbursement, 50-55, § 22.  
bill not an assignment of, 644-646, § 211.  
check not an assignment of, 752-758, § 325.  
current funds, whether money, 82-84, § 25.  
acceptance "when in funds," 674n.  
want of funds in hands of drawee, effect, 520-522, 576-577, §§ 139, 185.

**General Acceptance:**

form and effect of, 668-673, §§ 227, 228.  
to pay at a particular place, 672-673, § 228.

**Gift:**

of donee's obligation, 599-604, § 203.

**Good Faith:** (See NOTICE; HOLDER IN DUE COURSE.)**Grace, Days of:**

abolished, § 145.  
when last day of, a holiday, 483.  
non-negotiable bills have, 715-716.  
sight bill entitled to, 679-680.

**Guaranty:** (See WARRANTY.)

transfer by indorsing, 263-265.  
writing above blank indorsement, 269-270.  
contract of guarantor, 467-471.  
whether transferable, 471-474.  
defenses to, 474-476.  
indorser of non-negotiable note undertakes, 720-721.  
whether accommodation contract is a continuing, 328-335.  
whether irregular indorsement a, 447n, 721n.  
whether acceptance by a stranger a, 650n.

**Holder:**

defined, § 2.  
when deemed holder for value, 249-253, 319-360, §§ 52, 91.  
may convert blank indorsement into special, 268-269, § 65.  
under special indorsement of instrument payable to bearer, 288-297, § 70.  
of instrument transferred without indorsement, 307-310, § 79.  
may strike out indorsement, 306-307, §§ 78, 202.  
may sue in his own name, 314-318, § 90.  
title of, in action, 314-318.  
entitled to benefit of warranty, § 115.  
principal debtor as, 597-598, § 200.  
discharge of instrument by, 591-592, § 200.  
discharge of party by, 626-639, § 201.  
renunciation of rights by, 599-608, § 203.  
may refuse oral acceptance, § 221.  
may refuse qualified acceptance, 677, § 230.  
option to resort to referee in case of need, § 215.  
consent to acceptance for honor, § 280.  
refusal to receive payment for honor, § 305.  
procuring certification of check, 743-751, § 324.  
duties of, 689, § 247.  
See PRESENTMENT FOR PAYMENT.  
NOTICE OF DISHONOR.  
PRESENTMENT FOR ACCEPTANCE.  
PROTEST.  
rights of, upon dishonor, 690, § 248.  
duty to receive payment for honor, § 305.  
no action against bank on check, 752-758, § 325.

**Holder in Due Course:** (See DEFENSES.)

requisites to constitute,  
instrument complete and regular, 319, § 91.

**Holder in Due Course** — Continued.

- instrument not overdue, 320-337, § 91.
- taken in good faith and for value, 337-340, § 91.
- taken without notice of infirmity, 340-357, § 91.
- holder deriving title from, 360, § 97.
- may recover full amount, 361-364, § 96.
- burden of proof, 365-370, § 98.
- notice to, before consideration paid, 357-360, § 93.
- of instrument wrongfully filled up, 163-191.
- of instrument transferred without indorsement, 307-310, § 79.
- of altered instrument, 611, § 205.
- of instrument transferred after dishonor for non-acceptance, 587-589, § 188.
- of part of bills in a set, § 311.
- entitled to warranties, 419-442, § 115.

**Holder for Value:**

- what constitutes, 249-253, 337-340, § 52.
- may enforce against accommodation party, 254-255, § 55.
- amount recoverable by, 361-364, § 96.

**Holiday:**

- time, how computed, §§ 5, 145.
- bill or note due on, 483n, 504-508, § 145.
- presentment for acceptance on, 504-508, §§ 145, 243.

**Hour:**

- whether reasonable for presentment, 494-495.
- of service of notice of dishonor, 552-553, § 174.
- of closing of mails, 556-558, § 175.
- for presentment for acceptance, § 242.

**Husband and Wife:** (See COVER-TURE.)**Illegality:**

- as a defense, 368-370, 371, 373n, 432.
- warranty against, 432-433, § 115.

**Impossibility:**

- as excuse for steps, 524-527, 573-574.

**Incomplete Instrument:**

- want of delivery of, a defense, 386-387, § 34.
- as notice of defects, 319, § 91.
- acceptance of, 666-668, § 226.

**Indorsee:**

- cannot be two or more severally, § 62.
- special, must indorse to transfer, 268, § 64.
- under restrictive indorsement, 271-284, §§ 66, 67.
- under conditional indorsement, 287, § 69.
- if two or more, all must indorse, 298, § 71.
- cashier, payable to bank, 299-301, § 72.
- name misspelled, 301-302, § 73.
- in trust, 277-280, § 66.

**Indorsement:**

- defined, § 6.
- form required, 34-35, 37, 266-268, §§ 61-62.
- must be of whole instrument, 267-268, § 62.
- kinds of, 268-288, § 63.
  - special, 268, § 64.
  - blank, 144, 268-271, §§ 28, 64.
  - restrictive, 271-284, § 66.
  - qualified, 284-287, § 68.
  - conditional, 287, § 69.
- of instrument payable to bearer, 288-298, § 70.
- of instrument payable to two or more persons, 298, § 71.
- of instrument payable to cashier, 299-301, § 72.
- where name misspelled, 301-302, § 73.
- in representative capacity, § 74.

**Indorsement** — Continued.

- presumption as to time of, 302, § 75.
- presumption as to place of, 302-306, § 76.
- striking out, 306-307, § 78.
- transfer by, 261-266, § 60.
- transfer without, 307-310, § 79.
- by infant or corporation, 220-221, § 41.
- of overdue instrument, 97, 272, 320-337.
- warranty from, 419-440, § 115.
- forged, 221-233, § 42.
- filling up blank, 268-270, § 65.

**Indorser:**

- who deemed indorser, 458-459, § 113.
- liability of general, 442-445, § 116.
- warranties of, 419-440, § 115.
- for what amount liable, 363, § 96.
- irregular, 446-458, § 114.
- order of liability, 459-465, § 118.
- when not entitled to notice of dishonor, 577-586, § 186.
- payment by, 594-597.
- of instrument payable to bearer, 288-298, § 70.
- of parts of bills in set, 709, § 312.
- of a check, 748-752.
- discharge of,
  - by striking out indorsement, 306, § 78.
  - by failure to take steps, §§ 130, 160, 241, 260.
  - by taking qualified acceptance, 677, § 230.
  - by certification of check, 748-752, § 324.
- action against on day of maturity, 443-445.

**Indorser Without Recourse:** (See WITHOUT RECOURSE.)**Infant:**

- indorsement by, 220, 418-419, §§ 41, 111.
- defense of infancy, 372.

**Inland Bill:**

- defined, 646-647, § 213.
- protest of, 482, 585, 691n, § 189.

**Installments:**

- do not render sum uncertain, 67-72, § 21.
- nor provision that upon default in one, all shall be due, 72-73, § 21.

**Interest:**

- does not render sum payable uncertain, 64-67, § 21.
- runs from what time, 39n, 194-195, § 36.
- overdue as dishonoring paper, 335-337.
- alteration in, § 206.
- demand note payable with, 483-488.

**Interpretation:**

- date, 161-163, § 30.
- blanks, 163-192, §§ 32-33.
- ambiguous language, 192-197, § 36.
- ambiguous signatures, 197-220, §§ 37-39.
- codifying statutes, 5, 12, 126-127, 396-397, 451.

**Inurement:**

- doctrine of, as to notice, 534-535.

**I. O. U.:**

- whether a negotiable instrument, 37-40, 42.

**Irregular Indorser:**

- liability of, 446-458, § 114.

**Joint Parties:**

- acceptors or makers,
  - presumption, 196, § 36.
  - presentment to, 517, § 138.
- payees,
  - in instrument, 115-118, § 27.
  - indorsement by, 298, §§ 71, 118.
- drawers, notice to, § 171.

**Joint Parties — Continued.**

indorsers,  
 presumption, 468, § 118.  
 contribution among, 461-462.  
 right to securities, 466.  
 notice to, § 171.  
 drawees,  
 bill addressed to, 642-644, § 212.  
 presentment to, 687-688, § 242.  
 retransfer to one of the, 699n.  
 discharge of one, 631n.

**Judgment:**

authorizing confession of, does not render  
 instrument non-negotiable, 93, § 24.  
 in favor of principal debtor, discharges  
 surety, 628n.

**Laches:** (See DELAY.)**Law Merchant:**

when governs, § 7.  
 history of, 15-23.

**Liability of Parties:** (See PARTIES.)**Lien:**

on instrument constitutes holder for value,  
 252, § 53.

**Lost Instrument:**

liability on, 400, 592n.  
 protest of, § 268.  
 right of finder, 314.

**Mails:** (See POST-OFFICE.)**Maker:**

liability of, 400, § 110.  
 admissions by, 401, § 110.  
 note to maker's own order, 113, 715, §§ 27,  
 320.  
 signature of, 35-36.  
 negligence in signing, 391-399.  
 joint and several, 196.  
 presentment not necessary to charge, 477-  
 480.

**Marriage:** (See COVERTURE.)**Maturity:** (See GRACE; HOLIDAY.)

day of, 483, § 145.  
 time of, for demand notes, 822-824, 483-494.  
 action against indorser on day of, 443-445.  
 protest before day of, when proper, § 266.

**Money:**

instrument must be payable in, 81-89, §§ 20,  
 220.  
 what constitutes current, 82-90.  
 election in lieu of, 94-96, § 24.  
 promise in addition to payment of, 90-96,  
 § 24.  
 foreign, 88-89.  
 specifying current does not affect negotiabil-  
 ity, 82, § 25.  
 alteration in kind of, § 206.

**Negligence:**

is not bad faith, but only evidence of it,  
 340-356, § 95.  
 in signing instrument, 391-399.  
 in leaving spaces, 616-624.

**Negotiable Instruments:**

history of, 24-31.  
 codification of, 3-15.  
 kinds of, 24-33.  
 See **BILLS OF EXCHANGE.**  
**PROMISSORY NOTES.**  
**CHECKS.**  
**BONDS.**

**Negotiable Instruments — Continued.**

form of (see **FORM OF NEGOTIABLE IN-  
 STRUMENTS**).  
 continuation of negotiable character, 272-  
 274, § 77.  
 defenses to (see **DEFENSES**).  
 paper payable in trust is, 354-357.

**Negotiable Instruments Law:**

history of, 9-13.  
 list of states which have enacted, 776.  
 text of, 779-841.

**Negotiation:** (See **INDORSEMENT**; **DE-  
 LIVERY**.)

defined, 25, 259, § 60.  
 by delivery, 260, § 60.  
 by indorsement and delivery, 261-266, § 60.  
 may delay presentment, 490-494, 735, 740,  
 § 131.  
 of overdue instrument, 272-274, 320-337.  
 of guaranties, 471-474.

**Non-Acceptance:** (See **ACCEPTANCE**.)

effect of, 689, 690, § 248.  
 notice of, necessary, 530-533, § 160.  
 effect of subsequent presentment for pay-  
 ment, 530n, 587-589, § 247.

**Non-Negotiable Notes:**

what are, 145-148, 715-721, §§ 20, 320.  
 have grace, 715-716:  
 as to presumptive consideration, 716-720.  
 liability of indorser of, 265n, 580n, 720-721.  
 any instrument in hands of holder not in  
 due course is like, § 97.

**Non-Payment:**

notice of, when necessary, 530, § 160.

**Notarial Act of Honor:**

necessary to payment for honor, 707, §§ 301-  
 302.

**Notary:** (See **PROTEST**.)

when presentment by, necessary, 482, 585,  
 691n, §§ 189, 260.  
 protest by, 691-700, §§ 260-263, 267-268.  
 whether he must act in person, 481, 698-700.  
 signature and seal, 481-482, § 261.  
 fees of, 363, 589n.

**Notice:** (See **HOLDER IN DUE COURSE**.)

of defect or defense, 340-357, § 95.  
 from face of paper, 345-357.  
 before full amount paid, 357-360, § 93.  
 not from indorsement without recourse, 285-  
 287, § 68.  
 overdue paper, 320-337.  
 overdue interest as, 335-337.  
 not because payable in trust, 354-357.

**Notice of Dishonor:**

necessary to charge drawer or indorser, 530-  
 553, § 160.  
 what constitutes sufficient notice,  
 by whom given, 533-538, § 161.  
 form of, 539-542, § 167.  
 mode of service, 542-546, § 167.  
 to whom given, 546-548, §§ 168-172.  
 within what time, 548-565, §§ 173-175.  
 at what place, 565-573, § 179.  
 when delay excused, 573-575, § 184.  
 when notice dispensed with,  
 as to drawer, 575-577, § 185.  
 as to indorser, 577-580, § 186.  
 due diligence, 580, § 188.  
 waiver, 580-586, §§ 180-181.  
 notice of non-payment when acceptance  
 refused, 586, § 187.  
 proof of notice, 589-590, § 189.  
 successive notices, 561-565, § 178.



**Noting:**

delay excused, § 267.  
subsequent extension of protest, 696-698, § 263.

**Office:**

holder of, as payee, 121, § 27.

**Order:**

bill must contain, 44-45, § 20.  
unconditional, 46-61, §§ 20, 22.  
no additional act, 90, § 24.  
bill must be payable to, or bearer, 145-148, §§ 20, 27-28.

**"Order or Bearer":**

not necessary by law merchant, 158-159.  
not necessary by bills of exchange act § 27 (note), 669n.  
necessary by negotiable instruments law, 145-148, §§ 20, 27-28.

**Overdue Bill or Note:**

is payable on demand, 97, 272-274, § 26.  
continues negotiable, 272-274, § 77.  
indorsement of, 97, 272-274.  
transferee not holder in due course, 320-337, § 91.  
overdue interest, 335-337.  
when demand note is overdue, 322-324, 483-494.  
acceptance of, § 226.  
presentment for acceptance before, 680, § 242.  
accommodation paper, 328-335.

**Parol: (See WRITING.)**

acceptance by, 649n.  
varying indorsement by, 271n.

**Particular Fund:**

indication of, 50-54, § 22.  
order or promise to pay out of, 49, § 22.

**Parties:**

primarily liable,  
defined, § 3.  
maker, 400, § 110.  
acceptor, 403, § 112.  
discharge of, 591-626, § 200.  
secondarily liable,  
defined, § 3.  
drawer, 418, § 111.  
indorser, 442, § 116.  
irregular indorser, 446, § 114.  
discharge of, 626, § 201.  
guarantor, 466.  
acceptor for honor, 701-706, §§ 280-289.  
drawee, 148, § 20.  
payee, 106-148, §§ 20, 27-28.  
joint and several (see JOINT PARTIES).  
accommodation (see ACCOMMODATION PARTY).  
alteration in, 608-610, § 206.  
to action must appear on bill, 197-199, § 37.

**Partners:**

signatures by, 650n.  
accommodation paper by, 345-346.  
presentment for payment to, 694-695, § 137.  
notice of dishonor to, 547-548, 575, § 170.  
authority to make alterations, 608-610.  
authority to accept, 687-688.  
form of acceptance, 650n.  
indorsement by, 298, § 71.

**Patent Rights:**

negotiable instrument given for, 384, 385n, § 330.

**Payee:**

who may be, 113-121, § 27.  
must be certain, 107-113, § 27.

**Payee — Continued.**

fictitious, 123-144, § 28.  
two or more, 115-118, § 27.  
one or some of several, 118-121, § 27.  
cashier as, 299, § 72.  
name misspelled, 301, § 73.  
admissions as to, 401, 403, 419, §§ 110-112.  
whether holder in due course, 174-190, 396.

**Payment:**

to conditional indorsee, 287, § 69.  
discharges instrument, 591-599, §§ 77, 200.  
holder may enforce, 314-319, § 90.  
negotiable instrument as, 741.  
of forged bill, 403-418.  
in due course, 591-592, § 148.  
by indorser does not discharge maker, 594-597.  
by party secondarily liable, 639-641, § 202.  
by accommodated party, 640-641, § 202.  
of bills in a set, § 314.  
after notice of defect, 357-360, § 93.  
of bills under forged indorsement, 433, 441, 403-418, 221-233.  
renewal note as, 593.

**Payment for Honor:**

when proper, 707, § 300.  
by whom, 707, § 300.  
for whom, 707, § 300.  
formal requisites,  
prior dishonor and protest, 707, § 300.  
notarial act of honor, 707, §§ 301-302.  
declaration of intention, § 302.  
effect of,  
discharge of parties subsequent, 708n, § 304.  
liability of prior parties, 707, § 304.  
effect of refusal to receive, § 305.  
does not apply to notes, 708.

**Payment Supra Protest: (See PAYMENT FOR HONOR.)****Pencil:**

necessary writing may be in, 34-35, 37.

**Personal Representative: (See EXECUTOR.)****Place:**

of drawing or payment need not be specified, 158-159, § 25.  
of indorsement, presumption, 302-306, § 76.  
of presentment,  
for payment, 508-516, § 133.  
for acceptance, 685n.  
to acceptor for honor, § 287.  
of acceptance, 478n, 675-676, §§ 228, 240.  
of serving notice, 565, § 179.  
of payment, § 240.  
alteration in, § 206.

**Post-Office:**

notice of dishonor through, 543-546, 556n, 554-561, 565, 566-573, §§ 167, 174-177, 179.  
delays caused by, 518-520, § 176.  
interruption of mails by war, 573-574.

**Pre-existing Debt: (See ANTECEDENT DEBT.)****Presentment for Acceptance: (See ACCEPTANCE.)**

when necessary, 679-685, § 240.  
within what time, 680-684, § 241.  
what is sufficient, 685-688, § 242.  
when delay excused, § 244.  
when presentment excused, 688-689, § 245.  
duty of holder where bill not accepted, 689, § 247.  
effect of dishonor, 689-690, § 248.

**Presentment for Payment:**

- necessity of,
  - not to charge acceptor or maker, 477-480.
  - not after dishonor for non-acceptance, § 248.
  - to charge drawer or indorser, 480.
  - to charge acceptor for honor, 703, 705, § 248.
- what constitutes sufficient,
  - by whom, 480-483, § 132.
  - at what time, 483-508, § 132.
  - at what place, 508-516, § 133.
  - to whom, 516-518, § 132.
  - when maker dead, 516-517, § 136.
  - when makers joint, 517-518, § 138.
  - by exhibiting instrument, 511, 524-527, § 134.
  - to acceptor for honor, § 287.
  - when delay excused, 518-520, § 141.
  - when presentment excused,
    - no right to expect it, 520-524, §§ 139, 140.
    - when impossible, 524-527, § 142.
    - when waived, 527-529, § 142.
  - of checks, 725-743, § 322.

**Presumptions:** (See BURDEN OF PROOF.)

- of consideration in negotiable instrument, 234-239, § 50.
- of consideration in non-negotiable instrument, 716-720.
- of value for every signature, § 50.
- of place of indorsement, 302-306, § 76.
- of time of indorsement, 302, § 75.
- that holder is holder in due course, 365-375, 591-592, § 98.
- of order of indorser's liability, 459-466, § 118.
- that parties indorse jointly and severally, 466, § 118.
- from deposit of notice of dishonor in mail, 544-545, § 176.

**Primary Party:** (See PARTIES.)**Principal:** (See AGENT.)**Procuration:**

- signature by, 219-220, § 40.

**Promise:** (See FORM.)

- note must contain a, 37-44, § 20.
- must be unconditional, 46-61, §§ 20, 22.
- must not be of act additional to payment of money, 90-96, § 24.
- to pay out of particular fund, 49-54, § 22.
- to accept, when an acceptance, 654-657, § 223.

**Promissory Note:**

- origin and history, 27-28, 714.
- definition of, § 320.
- form (see FORM OF NEGOTIABLE INSTRUMENT).
- interpretation (see INTERPRETATION).
- non-negotiable (see NON-NEGOTIABLE NOTES).
- protest of, 480-482, § 54.
- given for patent right, 384, 385n, § 330.
- given for speculative consideration, § 331.
- ambiguous instrument may be treated as, 113, 150, § 36.

**Protest:**

- when proper, § 189.
- notes and inland bills, § 189.
- for better security, § 266.
- when necessary, § 189.
- foreign bills, 691, § 260.
- bills accepted for honor, 701, §§ 284, 286, 289.
- reference in case of need, § 286.
- before payment for honor, 707, § 300.

**Protest — Continued.**

- what constitutes sufficient,
  - form and contents, 691-698, § 261.
  - by whom, 698-700, § 262.
  - on what day, § 263.
  - at what place, § 264.
- mode of making,
  - noting, 696-698, § 263.
  - certificate of, 691-698, § 261.
  - lost bill, § 268.
- when excused, 578-579, § 267.
- as proof of notice of dishonor, 548-554, 589-590.
- fees reasonable for, 363-364, 589n.
- waiver of, 584-585, § 181.

**Purchase for Value Without Notice:** (See HOLDER IN DUE COURSE.)**Purchase of Instrument:** (See TRANSFER.)

- distinguished from loan, 361n.
- distinguished from payment, 597-598.

**Qualified Acceptance:**

- definition and effect, 673-678, 688n, §§ 229-230.

**Qualified Indorsement:**

- definition and effect, 284-287, § 68.

**Ratification:**

- of forgery, 221-223.
- of unauthorized alteration, 610n.

**Reasonable Time:** (See TIME.)

- how determined, 483-494, 684n, 735-740, § 4.

**Referee in Case of Need:**

- defined, 643, § 215.
- protest before presentment to, § 286.
- excuse for delay in presentment to, § 288.

**Re-issue:** (See RETRANSFER.)

- by prior party, 276-277, 310-313, 639-640, § 80.

**Release:** (See DISCHARGE.)

- of principal, 591-626, § 200.
- of surety, (see DISCHARGE OF SURETY).

**Removal from State:**

- effect upon presentment, 513-515.
- effect upon notice, 571-573.

**Renewal Note:**

- whether payment of former note, 593, 605-608.
- forgery of, 582-585.
- promise to make, renders instrument contingent, 106n.

**Renunciation:**

- discharge by, 599-608, § 203.
- writing or delivery necessary, 601-604, § 203.

**Restrictive Indorsement:**

- definition and effect, 271-284, §§ 66-67.

**Retransfer:**

- to prior party, effect of, 276-277, 310-313, 598n, 599-601, 605-608, 628n, 639-640, § 80.

**Sale of Negotiable Instrument:** (See NEGOTIATION; TRANSFER; WARRANTY.)**Saturday:**

- maturity of instrument on, 504-508, § 145.
- presentment for acceptance on, § 243.

**Seal:**

- effect upon negotiability, 159-160, § 25.
- of notary, § 261.

**Secondary Party:** (See PARTIES; DISCHARGE OF SURETY.)

**Security:** (See COLLATERAL SECURITIES.)  
 protest for better, § 266.

**Seller of Negotiable Instrument:**  
 warranties by, 419-442, § 115.  
 agent's liability as, 441-443, § 119.  
 payment distinguished from sale, 597-598.

**Set, Bills in a:** (See BILLS IN A SET.)

**Set-Off:**  
 as a defense, 373n, 320-324, 475.

**Sight Bills:**  
 presentment for acceptance, 679-680, §§ 23, 240.  
 have grace, 679-680.

**Signature:**  
 only those liable whose signatures appear, 197-201, 205-207, § 37.  
 by maker or drawer, 35-36, § 20.  
 by acceptor, 648-649, § 220.  
 by indorser, 37, 266, § 61.  
 by agent, 197-220, §§ 37-40.  
 fictitious, § 37.  
 irregular, 446-458, §§ 15, 113, 114.  
 ambiguous, 197-220, §§ 36-39.  
 forged, 221-233, § 42.  
 presumption as to value for, § 50.  
 joint, 196, § 36.  
 distinguished from subscription, 36n.  
 on blank paper, 168-169, § 33.  
 on incomplete instrument, 163-192.  
 lacking on instrument, 319.  
 obtained by trick, 387-390.

**Spaces:**  
 unauthorized filling in, 616-624.  
 distinguished from blanks, 616-624.

**Special Indorsement:**  
 definition and effect, 268, § 64.  
 written above blank indorsement, 268-271, § 65.  
 of instrument payable to bearer, 288-297, § 70.

**Statement of Transaction:**  
 does not render bill or note conditional, 55-61, § 22.

**Statute of Frauds:**  
 irregular indorsement, 447n.  
 guaranties, 469-470.  
 defense to instrument, 628n.

**Stolen Instrument:** (See LOST INSTRUMENT.)

**Sum Certain:** (See CERTAINTY.)

**Sunday:** (See HOLIDAY.)

**Surety:** (See DISCHARGE OF SURETY; GUARANTOR.)  
 contribution among sureties, 461-462.  
 right to securities, 466.  
 defenses available to, 474-476, 629-638.  
 reservation of rights against, 629-631, § 201.

**Tender of Payment:**  
 by principal discharges surety, 629, § 201.  
 what amounts to, 478-480, § 130.

**Time:**  
 how computed, 483n, §§ 5, 146.  
 reasonable, how determined, 483-494, 684n, 735-740, § 4.  
 certainty of, 96-106, § 23.

**Time — Continued.**

of indorsement, presumption, § 302, § 75.  
 for making presentment, 483-508, §§ 131, 135.  
 of maturity, 96-102, 483n, § 145.  
 forgiving notice of dishonor, 548-565, §§ 173-175.  
 allowed drawee to accept, 660-666, § 224.  
 acceptance qualified as to, 676, § 229.  
 for presentment for acceptance, 680-684.  
 for making protest, § 263.  
 for presenting check, 725-743, § 322.  
 given to principal, is surety discharged—631-633, 634-638, §§ 200-201.  
 given to principal discharges guarantor, 638n.  
 when indorsement subsequent to transfer takes effect, 307-310, § 79.  
 presentment, when time insufficient for, § 244.

**Title:** (See HOLDER IN DUE COURSE.)  
 when defective, § 94.  
 warranty, 433, § 115.  
 of indorsee under restrictive indorsement, 274-276, 280-284, § 67.  
 of indorsee under infant's indorsement, 220, § 41.  
 of transferee without indorsement, 307-310, § 79.  
 of holder of instrument payable to bearer and restrictively indorsed, 288-291.  
 of holder in action, 314-318.  
 of holder to guaranty, 471-474.

**Transfer:** (See NEGOTIATION; HOLDER IN DUE COURSE.)

what constitutes, 259.  
 by delivery, 260, § 60.  
 by indorsement, 261, § 60.  
 without indorsement, 307-310, § 79.  
 retransfer, 310-313, § 80.  
 for purpose of suit, 316n.  
 in trust, 277-280, § 66.  
 warranties, 419-442, § 115.  
 when overdue, 320-337, § 91.  
 of overdue accommodation paper, 328-335.

**Trust:**  
 indorsement in, 277-280, § 66.  
 under conditional indorsement, 287, § 69.  
 instrument payable in, 354-357.  
 holder may recover in trust for indorser, 594-597.

**Uncertainty:** (See CERTAINTY.)**Unconditional Promise or Order:** (See FORM.)

necessary to negotiability, 46, §§ 20, 22.  
 when order or promise is unconditional, 46-61, §§ 20, 22.

**Usury:**  
 purchase of business paper is not, 361n.  
 taking interest in advance is not, 567.  
 as a defense, 372, 378-383.  
 warranty against, 427-431, 437-439.

**Value:** (See HOLDER FOR VALUE.)  
 defined, §§ 2, 51.  
 need not be specified, 158-159, § 25.  
 holder for, 249-253, 337-340, §§ 52, 91.  
 antecedent debt as, 239-249, § 51.

**Virtual Acceptance:**  
 form of, 654-657, § 223.  
 effect, 657n.

**Waiver:**  
 of benefit of law, 94, § 24.  
 of presentment for payment, 527-529, § 142.  
 of notice of dishonor, 580-586, § 180.  
 of protest, 584-585, §§ 182, 267.

**Warranty of Seller:**

where transfer by delivery, 419-442, § 115.  
where transfers by indorsement, 437-440,  
§ 116.  
by agent who transfers, 441-442, § 119.  
by agent who signs for principal, 216-217.

**Without Recourse:**

indorsement qualified by, 272-274, 284-287,  
§ 68.  
warranties where so transferred, 419-442,  
§ 115.

**Writing:**

defined, § 2.  
necessity of, in negotiable instrument, 34-35,  
§ 20.  
necessity of, in case of renunciation, 601-604,  
§ 203.  
holder may require acceptance in, 648-649,  
§ 220.  
acceptance by separate, 651-654, § 222.  
necessity of, in acceptance for honor, § 281.  
promise to accept must be in, 654-657, § 223.  
conflict with print, 195-196, § 36.



















